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**A NEW**  
**ABRIDGMENT OF THE LAW.**

**BY MATTHEW BACON,**  
**OF THE MIDDLE TEMPLE, ESQ.**

**WITH**  
**LARGE ADDITIONS AND CORRECTIONS,**  
**BY SIR HENRY GWYLLIM,**  
**AND**  
**CHARLES EDWARD DODD, ESQ.**

**AND WITH**  
**THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED**  
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**BY BIRD WILSON, ESQ.**

**TO WHICH ARE ADDED**  
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## MISNOMER AND ADDITION.

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THE names of men, at this day, are only sounds for distinction's sake, though perhaps they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them but to mark out the families or individuals we speak of, and to difference them from all others; since, therefore, they are the only marks and *indicia* of things which human kind can understand each other by, we must see what certainty the law requires herein, and what the effects and consequences are of the omission of the name, or false specification of the party; and this we shall do under the following heads:—

- (A) What Names are considered as the same.
- (B) What Names and Additions are required by Law, and must be truly inserted:  
And herein,
  - 1. *Of the Difference between the Christian Name and Surname.*
  - 2. *Of the Addition of the Estate or Degree.*
  - 3. *Of the Addition of the Mystery.*
  - 4. *Of the Addition of the Town, Hamlet, Place, or County.*
  - 5. *Of Additions which are only Conveyances to the Action.*
- (C) Where the Name is truly put at first, and afterwards varied from.
- (D) Of the difference between a Mistake in Grants, Obligations, &c., and Judicial Proceedings.
- (E) At what Time the Mistake must be taken Advantage of, and how the same is salved.
- (F) Of the Manner of taking Advantage of and pleading a Misnomer or Want of Addition.
- (G) Who may take Advantage thereof.

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### (A) What Names are considered as the same.

If two names are in an original derivation the same, and are taken promiscuously to be the same in common use, though they differ in sound, yet there is no variance; and therefore where *Piers* Griffith brought an *audita querela*, to which an outlawry was pleaded by the name of *Peter* Griffith, the plea was allowed; for it appears by acts of parliament, that *Piers* and *Peter* have been used promiscuously, as signifying the same person.

Cro. Ja. 225; 2 Roll. Abr. 135, *Piers* Griffith v. *Hugh* Middleton. <sup>2</sup>See *Lessee* of *Gordon* v. *Holliday*, 1 Wash. C. C. R. 285; *Henderson* v. *Ballentine*, 4 Cow. 549; *Waterbury* v. *Mather*, 16 Wend. 611; *Mead* v. *Haws*, 7 Cowen, 332; *Meredith* v. *Hinsdale*, 2 Caines, 362; *Griswold* v. *Sedgwick*, 6 Cowen, 456; *Donnelly* v. *Foote*, 19 Wend. 148.<sup>g</sup>

So, *Saunders* and *Alexander*, *Jane* and *Joan*, *Jean* and *John*, *Garret*, *Gerat*, and *Gerald*, are the same names.

<sup>9</sup> Roll. Abr. 135; Leon. 147.

But *Ralph* and *Randall*, *Randolphus* and *Randalphus*, *Sibel* and *Isabella*,

(A) What Names are considered as the same.

have been held to be distinct names; and so of others, in which there is a substantial variance in sound, original, and common use.

2 Roll. Abr. 135; Palm. 71; *Shakespeare* and *Shakepeare* are not *id. son.*, 10 East, 83.]

So, *Agnes* and *Anne* are different names; and therefore if one declare against J S, and Agnes his wife, and on the record of *nisi prius* it is Anne his wife, this is a material variance, and not amendable.

2 Roll. Abr. 135. Vide head of *Amendment and Jeofail*.

¶ *Grautis* and *Gerardus* are different names; so are *Quartus* and *Gerardus*. Mann v. Carley, 4 Cowen, 148.

When the name is a foreign one, and according to the pronunciation of the language in which such a name is, the sound is the same or nearly so, as *Petris* for *Petrie*, it is not a misnomer.

*Petrie* v. Woodworth, 3 Caines, R. 219.

If *Nathaniel* and *Nathan* are in common use as the same name, the fact may be proven to do away the apparent misnomer.

*Utsler* v. *Utsler*, Wright, 627-8

If there are two English names that are distinct, and one Latin name for them both, such name shall serve for both; as *Jacobus* for James and Jacob, although two distinct English names.

2 Roll. Abr. 136; 3 Keb. 278; Mod. 107.

¶ The defendant being sued by the name of "Jonathan, otherwise John Soans," is no cause of demurrer to the declaration, for *non constat* that it is not all one Christian name.

*Scott* v. *Soans*, 3 East, 111.]

¶ P. Baxter, a pauper known in the town of L by the name *P. La Barron*, in a notice from that town to the town of N, was called *P. Labern*, and N, after ascertaining what person was intended, returned an answer that P. Labern had not a settlement in N. Held, that the notice was insufficient.

*Lanesborough* v. *New Ashford*, 5 Pick. 190. See 23 Pick. 57.

A mortgage was given by "E. H. 3d," to secure the payment of a note of like tenor with a previous note to "E. H." Held, that parol evidence was admissible to show that "E. H." and "E. H. 3d," were copartners under the firm of E. H., and that the note to E. H. was given for a partnership debt, and was the note mentioned in the mortgage.

*Hall* v. *Tufts*, 18 Pick. 455.

Where a seaman on board of a vessel was called "Lebrun," and "Lebring" and the administrator of "Lebering" claimed wages due to the latter, the court allowed him such wages, though no person was among the crew known by the name of "Lebering."

*Ketland* v. *Adm'r of Lebering*, 2 Wash. C. C. R. 201.

A declaration stated that "E. Brown" was attached to answer, and then proceeded to allege the drawing of a bill of exchange by "Elisha Brown;" proof of a bill of exchange drawn by "Elijah Brown" was offered and refused.

*Craig* v. *Brown*, Pet. C. C. 139.

It was left to the jury to say whether a tax which had been laid against "Asahel Moss, 2d," was properly laid against "Asahel Morse," and the

(B) What Names and Additions are required by Law, &c.

jury having found that these names designated the same person, it was held that he was thereby sufficiently identified.

*Litchfield v. Farmington*, 7 Conn. 100.

A defendant may be sued on an instrument by the name he has signed, though differing in sound from his true name.

*Meredith v. Hinesdale*, 2 Caines, 363.

When three partners of the same surname sued as "John, Jeremiah and Daniel Chambers," it was held that though the surname was not added to every Christian name, as it ought to have been, yet that this was not error.

*Chance v. Chambers*, 1 Penning. 384.g

(B) What Names and Additions are required by Law, and must be truly inserted :  
And herein,

## 1. Of the Difference between the Christian Name and Surname.

If the Christian name be wholly mistaken, this is regularly fatal to all legal instruments, as well declarations and pleadings as grants and obligations ; and the reason is, because it is repugnant to the rules of the Christian religion, that there should be a Christian without a name of baptism, or that such person should have two Christian names, since our church allows of no re-baptizing : and therefore if a person enters into a bond by a wrong Christian name, he cannot be declared against by the name in the obligation, and his true name brought in an *alias*, for that supposes the possibility of two Christian names ; and you cannot declare against the party by his right name, and aver he made the deed by his wrong name ; for that is to set up an averment contrary to the deed ; and there is this sanction allowed to every solemn contract, that it cannot be opposed but by a thing of equal validity ; and if he be impleaded by the name in the deed, he may plead that he is another person, and that it is not his deed.(a)

*Cro. Ja. 558, 640; Owen, 107; Dyer, 279; 5 Co. 43; Poph. 57; Noy, 135; Cro. Eliz. 57, 222; Willes, 554, Evans v. King. Vide 3 East, 111, Scott v. Soans; 2 Bos. & Pul. 466, Howell v. Coleman; Taylor, 148, Labat v. Ellis.* Where a plaintiff in an action of trespass *quare clausum fregit* declared by the name of *William Robinson*, and the deed under which he claimed title to the *locus in quo*, was to *William T. Robinson*, the variance was held to be immaterial. *5 Johns. Rep. 84, Franklin and others v. Tallmadge.* [(a) But if plaintiff sues defendant by the name he subscribed to the bond, &c., and defendant pleads a misnomer, plaintiff may reply he is as well known by the one name as the other, and give in evidence the defendant's actual subscription by that name.] See *Gould v. Barnes, 3 Taunt. 504.* But whether a man is known in the world by a particular name, depends upon his having been called so, not merely upon one or two occasions, but a plurality of times. *Per Lord Ellenborough, C. J., in Meester v. Hertz, 3 Maul. & S. 453.]*

But, though persons cannot have two Christian names at one and the same time, yet they may, according to the institution of the church, receive one name at their baptism, and another at their confirmation ; for though it allows no re-baptizing to make double names, yet it doth not force men to (b) abide by the names given them by their godfathers, when they come themselves to make profession of their religion.

*Co. Lit. 3; 2 Roll. Abr. 135; Judge Gawdy's case*, who was christened by the name of *Thomas*, and confirmed by the name of *Francis.* (b) But a person, by taking a new name of confirmation, does not lose his name of baptism. *6 Mod. 115, 116; Salk. 6, pl. 15; 2 Ld. Raym. 1015, 1016. {See Willes, 557.}*

¶ If the defendant have two Christian names, and they be transposed, as

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if he be baptized *Richard James*, and be called in the declaration *James Richard*, it is a misnomer, and may be pleaded in abatement.

*James v. Macquillin*, 5 Term R. 195.]

The mistake of the surname does not vitiate, because there is no repugnancy that a person should have different surnames; and therefore if John *Gape* enters into an obligation by the name of John *Gate*, he may be impleaded by the name in the deed, and his real name brought in by an *alias*, and then the name in the deed he cannot deny, because he is estopped to say any thing contrary to his own deed.(a)

3 H. 6, 25; 2 Roll. Abr. 146. [(a) See *Bonner v. Wilkinson*, 5 Barn. & A. 682.]

The declaration must be of the name in the obligation, with an *alias* of the real name; for the declaration must show the cause of complaint as it is; therefore it must in all things follow the obligation, and the intent of the *alias* is only to show he has been differently called from the name in the obligation; and therefore if a man oblige himself by the name of J S, esq., and afterwards he be made a knight, the plaintiff may declare against J S, knight, *alias* J S, esq.

*Dyer*, 273, Buls. 216; [*Gould v. Barnes*, 3 Taunt. 504; *Caumont v. Prevost*, 1 Chit. 512.]

{If the surname in an obligation vary in the spelling, but not much in the sound, from that in the subscription, the obligor may be sued by the name he has signed, without an *alias dictus* as to the name in the deed.

2 Cain. 362, *Meredith v. Hinsdale*.

Where a name appears to be a foreign one, a variance of a letter, which, according to the pronunciation of that language, does not vary the sound, is not a misnomer.

3 Cain. 219, *Petrie v. Woodworth*.}

It is said, that a person cannot take advantage of a mistaken surname in an indictment, either by plea in abatement, or otherwise, notwithstanding such surname have no affinity with his true one, and he was never known by it. And in this respect an indictment differs from an appeal, whereof it is certain, that a misnomer of a surname may be pleaded in abatement as well as any other misnomer whatsoever.

2 Hawk. P. C. c. 25, § 68.

*Junior* is no part of a person's name.

*Commonwealth v. Perkins*, 1 Pick. 338; *Cobb v. Lucas*, 15 Pick. 7; *Kincaid v. Howe*, 10 Mass. 203; 7 Johns. 549; 2 Caines, 164. See 17 Pick. 200; *Commonwealth v. Beckley*, 3 Metc. 330.

Whether the omission of the initial of a middle name is a misnomer, *quare*.

*Keene v. Meade*, 3 Pet. 2. See 4 Watts, 329; 5 Johns. 84; 14 Pet. 322; 2 Cowen, 463; Co. Litt. 3 a; 1 Ld. Raym. 562.

Where a person is in the habit of using initials for his Christian name, and is so indicted, and the fact whether he was so known is put in issue, and he is convicted, the court will not interfere on that ground.

*City Council v. King*, 4 M'Cord, 487.

If a defendant, sued by a wrong name, appear, he may be declared against by his right name, as sued by the name in the writ.

*Hare v. Harrington, Wright*, 290.

A misnomer of the person murdered, in an indictment, is of no conse-

(B) What Names and Additions are required by Law, &c.

quence, if the evidence show that the party is known by the name used in the indictment.

The State v. Gardiner, Wright, 392.

## 2. Of the Addition of the Estate or Degree.

It seems that the common law in no case required any other description of a person than by his Christian name and surname, unless he were of the degree of a knight or some higher dignity; but the names of dignity were always required, being marks of distinction imposed by public authority, and therefore making up the very name of the person to whom they are given. And they are of two sorts: 1st, Such marks of distinction as exclude the surname, so that the persons may not seem to be of any common family; and such are the names of earls, dukes, &c. 2dly. Such marks of distinction as are also imposed by the supreme power, and parcel of the name itself, but do not exclude the surname; such as knight, baronet, &c. And these marks of distinction were always to be made use of as part of the name in all legal proceedings; and so curious was the law herein, that if a plaintiff in any action gained a new name of dignity, pending a writ, he made it abateable. But this inconvenience is remedied by 1 E. 6, c. 7, § 3, by which it is enacted, "That if any plaintiff, in any manner of action, shall be made a duke, archbishop, marquis, earl, viscount, baron, bishop, (a) knight, justice of either bench, or serjeant at law, depending the same action, that such action for such cause shall not be abateable or abated."

2 Inst. 665; 2 Roll. Abr. 469; Show. 392; Comb. 180. (a) But it hath been holden, that the dignity of a baronet is not within the statute, because there was no such dignity at the time of the making it. Sid. 40; Lit. Rep. 81; Cro. Car. 104.

But names of worship, such as esquire, gentlemen and yeomen, since they are only names of distinction in popular use, and not given by the public authority of the supreme power, the law doth not count them parcel of the name, and therefore were not necessary at common law.

2 Inst. 666.

In the time of H. 5, it was perceived, that the Christian and surname were not sufficient denominations of persons, and did not sufficiently avoid the confusion that might happen by the mistake of persons; and that an innocent person might, upon a process of execution, be distrained upon having the same name with the real defendant: therefore, by the 1 H. 5, c. 5, it is enacted, "That in every original writ of actions personal, appeals and indictments, and in which the exigent shall be awarded to the names of the defendants in such writs original, appeals and indictments, additions shall be made for their estate or degree, or mystery, and of the towns or hamlets, or places and counties of the which they were or be, or in which they be and were conversant; and if by process upon the said original writs, appeals or indictments, in the which the said additions be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none; and that before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party, wherein the said additions be omitted."

2 Inst. 670; 2 Roll. Rep. 225. [This statute is to be taken strictly, and confined to those cases where process of outlawry lies; therefore want of proper addition is not pleadable to an information in nature of a *quo warranto*. Rex v. Brough, 1 Wils. 244.] [And now sinceoyer cannot be had of an original writ, Boats v. Edwards, 1 Doug. 227, a party can no longer plead in abatement of the original writ, the want of addition; for such plea is not pleadable until afteroyer. Deshons v. Head, 7 East, 283.]

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By this law the name of (a) worship was made equally necessary in these actions, as the name of dignity was before.

(a) But it is said to be no fault to give an esquire the addition of gentleman, *et sic e converso*. Bro. Addition, 44. Esquire and gentleman no variance. Fortesc. Rep. 354.

This law doth not extend to the names of plaintiffs, for they were in no mischief or danger to be mistaken, nor does it extend to real or mixed actions; because here the possessors were impleaded who were sufficiently specified, and so no other mark of distinction is needful; besides, no man can in the process possibly be grieved, because there is no process but of distress upon the land, and no (b) imprisonment at all in these actions.

2 Inst. 665; 6 Mod. 85. (b) In an assize, if the disseisin be found with force, so that a *capias pro fine* and *exigent* lies for the king, yet, because the original is in the reality, the defendant shall have no addition within this act. 2 Inst. 665.—So, there needs none in an inferior court where process of outlawry does not lie. Moor, 354, pl. 478.—Nor needs there any in any action where outlawry does not lie. Bro. Addition, 2.

||But where the plaintiff misnames himself, the defendant may plead the misnomer in abatement.

Stafford (Mayor, &c.) v. Bolton, 1 Bos. & Pul. 44. ||

As to the estate and degree required by the statute to be added, we must observe, that estate is defined by the civilians the capacity of moral persons; for, as natural persons have a certain space in which their natural existence is placed, and in which they perform their natural actions, so have persons in a community a certain state or capacity, in which they are supposed to exist, to perform their moral acts, and exercise all civil relations; and therefore where one, who is neither by birth, office, creation, or reputation, an esquire or gentleman, is named, with either of these additions; or where a gentleman by birth, who follows a trade or husbandry, is named with the addition of the trade or husbandry, and not of gentleman; (c) or where a peer, who has more than one name of dignity, is not named by the most noble; or where a gentlewoman is named spinster, or a yeoman is named gentleman; and such matter is pleaded in abatement, and found for the person who pleads it, the writ shall abate.

2 Inst. 669; 2 Hawk. P. C. c. 23, § 103. (c) *Sed qu.* If such exception would now be allowed?—A trader may be sued by his degree, or by his trade; and if by his degree, the writ shall not abate unless he shows he has a higher degree. Stra. 556, 816; Ld. Raym. 1541.

It hath been adjudged to be a good plea in abatement to a writ or indictment against one by the name of J S, knight, that he is a baronet and no knight.

Cro. Car. 371; Jon. 346.

So, in trespass against the defendant by the name of William Snow, baronet, who pleaded in abatement, that at the time of the bill purchased he was, and yet is a knight and baronet; and because he is not called knight as well as baronet, he prayed judgment, &c.; upon demurrer to this plea, the court were of opinion that it was good.

Carth. 14; Jeffereys v. Snow, Comb. 65, S. C.

So, if a man be impleaded by the name of J S where he is garter king-at-arms; this is not good, because it is not only a name of office, but of dignity and grant, made to him by the words, *creamus*, *coronamus*, and *nomen imponimus*, &c.

Leon. 249; Cro. Eliz. 542. Vide Stra. 850, S. P.

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A bishop may be described by the name of his bishopric, without the addition of his surname; but a parson must be impleaded by Christian and surname, and not John, parson of D, because bodies politic are founded by public authority to political ends; therefore the bishop, the superintendent of the diocese, is made a body politic to subserve all the purposes of government in the care of religion; and it is not thought necessary to give every person such a capacity.

2 Inst. 666.

A bishop of an Irish diocese may be as well described by the addition of his bishopric, as an English bishop may by the addition of an English one; but it seems clear, that no one can be well described by the addition of a temporal dignity in Ireland,<sup>(a)</sup> or any other nation besides our own; because no such dignity can give a man a higher title here than that of esquire.

2 Inst. 668; Theol. lib. 6, c. 15, § 12, 13. [(a) But now see the act of Union.]

The degree of a serjeant at law is certainly a good addition; and so, as is generally holden, is a degree in either university; yet a doctor in divinity may be described by the addition of clerk, as well as by that of doctor. *Armiger*, *generosus*, yeoman, labourer, are good additions of the estate and degree of a man, but not of that of a woman. *Generosa*, widow, single woman, wife of J S, spinster, are good additions of the estate and degree of a woman; and, as some say, spinster<sup>(b)</sup> is a good addition for the estate and degree of a man; but neither burgess, citizen, nor servant, are good additions, as being too general.

2 Inst. 667; 2 Hawk. P. C. c. 23, § 110. (b) *Sed qu.?*

If several defendants, of different names, have the same addition, it is safest to repeat the addition after each name; and if a father have the same name and addition with his son, the writ against the son is abateable, unless the addition of *puisne* be added to the other additions: but, if a father alone be a defendant, there is no need of the addition of *eigne*: also, if the son be declared against in *custodiâ mareschalli*, there is no need of the addition of *puisne*, unless the father be also in the custody of the marshal.

Salk. 7, pl. 16; 2 Hawk. P. C. c. 23, § 106.

It hath been held a fatal fault, to apply the addition to the name which comes under the *alias dictus* only, and not to the first name; but it is said not to be material, whether any addition be put to the name which comes under the *alias dictus*, or not; because what is so expressed is not material.

2 Leon. 183; Cro. Eliz. 583; Dyer, 88; [1 Saund. 14 a, note (1); 1 Leach, C. C. 490.]

The additions of the estate, degree and mystery of the party are not sufficient, unless they be the same which he had at the time of the writ. And in this respect, such additions differ from that of place, which is sufficiently shown by naming the defendant late of such a place.

2 Hawk. P. C. c. 23, § 107.

Also, it must plainly appear that the addition is referred to the party; and therefore it is not well expressed by the addition of his mystery, naming him B A, son of A of C, butcher; because butcher refers to A rather than to the son.

2 Inst. 670; 2 Hawk. P. C. c. 23, § 108; 2 Hal. Hist. P. C. 177.

## 12 MISNOMER AND ADDITION.

(B) What Names and Additions are required by Law, &c.

{ A plea in abatement for want of an addition in a *declaration* is a nullity.  
3 Bos. & Pul. 395, *Gray v. Sidneff*.

As, by the modern practice, the court will not grantoyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad withoutoyer, the effect is to prevent such a plea from being pleaded: and therefore if pleaded, the court will quash it.

7 East, 383, *Deshons v. Head*; and see 1 Bos. & Pul. 645, *Murray v. Hubbart* }

### 3. Of the Addition of the Mystery.

It seems agreed, that the word *mystery* includes all lawful arts, trades, and occupations; and that if one, under the degree of a gentleman, have divers of such arts, trades, or occupations, he may be named by any of them.

2 Inst. 668.

The additions of this kind which are said to be clearly good, are those of husbandman, merchant, broker, tailor, point-maker, smith, miller, carpenter, cook, brewer, baker, butcher, parish-clerk, mercer, fishmonger, dyer, school-master, scrivener, and such like.

2 Hawk. P. C. c. 23, § 114; 2 Hal. Hist. P. C. 176.

The additions of this kind, which are said to be clearly insufficient, are those of maintainer, extortioner, thief, vagabond, heretic, common informer, and such like.

2 Hawk. P. C. c. 23, § 115.

But the following additions of this kind are said to be questionable:—

2 Hawk. P. C. c. 23, § 116.

1st, Farmer; (a) which by the better opinion seems to be an insufficient addition; because if any mystery be implied in the notion of it, it is that of husbandry, of which husbandman is the proper addition.

(a) *Sed qu.* If this addition is not now frequently used, and, as being well understood, not objected to?

2dly, Chamberlain, butler, and pantler; which are holden to be insufficient additions, because they denote only a special kind of officer or servant, and imply nothing which, in the common understanding of the words, comes under the notion of a mystery; and from this ground it seems to follow, that neither groom nor page are good additions, and yet in some of the old books they seem to have been so admitted.

2 Hawk. P. C. c. 23, § 117, and several authorities there cited.

3dly, Hostler; which hath been holden to be a good addition, and seems properly enough to come under the notion of a mystery; and though it hath been resolved, that any one who keeps an inn may be sued by the addition of a labourer, upon the custom of the realm, for want of due care of the goods of his guests; because whoever keeps a common inn is, in that respect, liable to answer for such defects, by whatsoever addition he may be styled; yet this does by no means prove that such person may not as well be sued by the addition of hostler, but only that he may be sued as well under any other addition.

2 Hawk. P. C. c. 23, § 118.

### 4. Of the Addition of the Town, Hamlet, Place, or County.

It is a good addition of this kind to name the party late (b) of such a town; in which respect this addition differs from that of the estate, degree,



(B) What Names and Additions are required by Law, &c.

or mystery: and it is said, that if a defendant be named of A and ate of B, it is sufficient to prove either addition.

2 Hawk. P. C. c. 23, § 119; 2 Hal. Hist. P. C. 175. (b) On special original against A, *nuper de London*, merchant, he pleaded he had for four years been commorant at B, and traversed that at the time of the writ, *vel nuper tunc, vel unquam postea*, he was of London, and made affidavit; but the plea was set aside on motion. *Cortisos v. Mienoz*, Stra. 924. [In *Shelly v. Wright*, Barnes, 338, it is said not to be usual to set aside such a plea upon motion; but that the plaintiff ought to demur.

The addition of place is sufficiently shown by naming the defendant *de Londino*, or *de Norwico*; but not by naming him *Londini*, or *Bristolie*, for that imports only that he belongs to such town, but not that he lives there; nor by naming him of a town which is not a county of itself, without showing the county. If it name him of a parish which contains several towns, he may plead such matter in abatement; for the statute says, that the addition shall be of the town or hamlet; but a parish shall be intended to contain no more than one town, unless the contrary be shown.

2 Inst. 669; Dyer, 213; Cro. Jac. 167; 2 Hawk. P. C. c. 23, § 130.

If there be two towns in a county, the one called *Great Dale*, the other *Little Dale*, and the defendant be named only of *Dale*; he may plead, that there are two *Dales* in the county, called *Great Dale* and *Little Dale*, and none without an addition; and as some say, he may plead that there is no such town as *Dale*, either in this case, or where there is but one town called *Little Dale*, and he is named of *Dale*.

2 Hawk. P. C. c. 23, § 121. {See 1 Dall. 60, *Respublica v. Buffington, acc.*}

|| But if he enter into an obligation describing himself in it of *Dale* only, he shall be estopped from pleading that there is *Great Dale* and *Little Dale*, &c., for he cannot contradict his own deed.

*Jenkins*, 163, pl. 12; *Bonner v. Wilkinson*, 5 Barn. & A. 682.]]

If a defendant live in a hamlet, which is so far part of a town, that those who live in it are indifferently styled sometimes of the hamlet, and sometimes of the town; it seems to be in the election of the plaintiff, to name him either of the hamlet or of the town.

2 Hawk. P. C. c. 23, § 122.

If a defendant live in a place known by a special name, out of a town or hamlet, he may be named of such place.

2 Hawk. P. C. c. 23, § 123.

The habitation of the wife is sufficiently shown by showing that of the husband. (a)

2 Hawk. P. C. c. 23, § 124.—(a) The place where defendant is *conversant* is sufficient, though not *commorant* nor inhabitant. Barnes, 162.

¶ Misnomer of addition of place may be pleaded in abatement.

*Smith v. Bowker*, 1 Mass. 76.¶

##### 5. Of Additions which are only Conveyances to the Action.

When any particular character or relation gives any person rights and privileges, or makes him subject to any burden; to demand the one, or be liable to the other, the particular character or relation ought to be set forth; for since it is the cause of the action, it must certainly be material; and therefore when persons sue or are sued as heirs, executors, or administrators, they must be named as such, for these are necessary conveyances or inducements to the action, which if mistaken is fatal.

Vide tit. *Executors and Administrators*.

(C) Where the Name is truly put at first, &c.

But, where the inducement is not necessary, but surplusage only, as, if an action of detinue of charters be brought against J C, and the writ be *præcipe J C filio et heredi* of R C, and be count of a bailment to the defendant himself; the defendant plead, that he was son and heir to W C and not to R C, this is no good plea, because he is charged with an injury done by himself. But if he had been charged upon any covenant of his ancestors, as their representative, there, the periphrasis, or inducement, must have been rightly formed; for otherwise the plaintiff doth not entitle himself to his action; and, there, this had been a good plea.

Vide tit. *Heir and Ancestor*, Cro. Eliz. 333.

If this inducement be not at first in a declaration, yet if it afterwards appear that the party is charged as executor, this is sufficient; as, if an action of covenant be brought against J S, executor, and he be not named at first J S executor of the last will and testament; but afterwards it be shown, that the testator did covenant and bind himself, his executors, &c., and made J S his executor, and died; and a breach be assigned; this is sufficient, without a formal nomination.

Saund. 111, *Dean v. Guire*.

If an action of account be brought against a parson, they need not call him parson of Dale; but, if an assize be brought against a parson or prebend, for land that he hath in right of his church, he must be named parson or prebendary of the said church.

2 Inst. 666.

So, if an attorney of the Common Pleas bring a writ of debt, he need not name himself attorney; but if he bring a writ of privilege, he ought.

Vide head of *Privilege*.

(C) Where the Name is truly put at first, and afterwards varied from.

THE name must be truly put at first; for if that be omitted, there is a complaint against no person; therefore, where, in an *assumpsit*, J. Law declares thus: *J L queritur de Thom. Saunders, &c., cum in consideratione quod idem J L* would marry the daughter of the said Thomas Saunders, *super se assumpsit* to pay him 100*l.*, the declaration is bad, though after a verdict, because it does not say *prædict. Thom. Saunders super se, &c.*, for nobody is expressly charged with assuming; and when it is indifferent whether there can be an injury, or no, it is not by the court to be supposed. (a)

Cro. Eliz. 913, *Law v. Saunders*. (a) But as the pleadings are now in English, the pronoun *he* would have been used, and, referring to the last antecedent, would have been sufficient.

But if the plaintiff counts against J S, *quod præd.* J S was seised of the manor of Dale, without saying *prædict. J S* or *de manerio prædict.*; this, after a verdict, shall be taken to be so; for he being named to be seised, and this by verdict being found, it is necessary it should be intended J S mentioned, for here it cannot possibly be taken indifferently either way.

Cro. Eliz. 192, *Watt's case*.

If J W declares against T W and the judgment is *quod prædict. T recuperet*, T shall be amended and made John; and note, that by the statute 16 & 17 Car. 2, c. 18, it is expressly provided, that judgment shall not be reversed for any mistake in Christian name or surname, in any declaration, plaint, or pleading.

Hob. 327; Cro. Ja. 662; Cro. Eliz. 865. Vide tit. *Amendment and Joind.*

(D) Mistakes in Grants, &c., and Judicial Proceedings.

But this must be understood where the record is before them, for otherwise it may be very fatal to a just cause; as, if A brings an *assumpsit* against B and declares he was bail or him at the suit of W. Adderly; and the defendant assumed to save him harmless, and that the plaintiff was taken in execution, and paid the debt; upon *non assumpsit* pleaded, it was found, that the defendant was arrested by the same William Adderly, but that he declared against him by the name of William Adderby, and the plaintiff became bail for him, &c. In this case the opinion of the court was, that the defendant was not chargeable; for Adderby and Adderly shall not be intended the same person, at whose suit the plaintiff became bail; for the verdict hath no credit against a record, and therefore it cannot reconcile the difference that appeared to be between the records; but in this case, if it had been before the court, it might have been amended.

Cro. Elia. 459, Franson v. Delamere.

If the surname in the judgment differs from the surname in the declaration, yet it shall be amended; for in the judgment the Christian name need only be mentioned, and the surname is redundant, and then *utile per inutile non vitiatur*; as, if a declaration be against John Morgan Wolf, and the judgment be against John Morgan, this is well enough: so, if a declaration be Henry Skinner, and judgment be entered *quod Henricus Soiner recuperet* 10*l.* assessed by the jury, and 5*l.* *eidem Henrico Skinner de incremento*, this is well enough.

Cro. Eliz. 865; Hob. 327; Cro. Ja. 632. *¶* The enrolment in the militia of C J H as C H was held to be bad. Comm. v. Hall, 3 Pick, 262. And an indictment against T H P, which described him as T P, was also holden to be bad. Comm. v. Perkins, 1 Pick. 388. But see as to a letter being put between the Christian and surname, 4 Watts, 329; 5 Johns. 84; 14 Pet. 322; 3 Pet. 7; 2 Cowen, 463; 1 Young, 602.*g*

The variance of the surname in the process to the sheriff destroys not the verdict; otherwise it is in the variance of the Christian name; for, when any man is named by two different surnames on record, it shall be intended he has two different surnames, as by law he may have; therefore, if a *venire facias* be to one by the name of George Thompson, and in the *distringas* he be named Gregory Thompson, and he appear and be sworn, the verdict is not good; but if there be two different surnames in the record, they shall be intended his real names, and then the verdict shall not be avoided; as, if a man be named in the *venire facias* Thomas Barker of B, and in the *distringas* Thomas Carter of B, and he appears and is sworn, and tries the issue, the verdict is good notwithstanding.

Cro. Eliz. 57, Deply v. Sprat.

So, if the Christian name be wrong in the *distringas*, or in the panel returned, or in the panel of the jury sworn, if it can be proved to be the same man that was intended to be returned in the *venire*, having there his right Christian name, it may be amended.

Roll. Abr. 196; 3 Buls. 18; Hob. 64; Brownl. 174.

(D) Of the Difference between a Mistake in Grants, Obligations, &c., and Judicial Proceedings.

If the Christian name be wholly mistaken, this, as hath already been observed, is not only fatal in judicial proceedings, but also in grants, obligations, &c.; and therefore if Edward obliges himself by the name of Edmund, it is ill.

Co. Lit. 3; Dyer, 279, pl. 9; Cro. Ja. 558; Owen, 107.

## (D) Mistakes in Grants, &amp;c., and Judicial Proceedings.

§ An application was made for the appointment of a guardian to *Susan Conkey*, (alleged to be *non compos mentis*,) and the order of inquisition described her as *Sarah Conkey*, but the return of the selectmen, and other proceedings in the probate court, contained the true name. It seems that, if notice was given to the right person, and there was no mistake as to identity, this would not be a fatal misnomer.

*Conkey v. Kingman*, 24 Pick. 115. g

But in grants, &c., if there be such sufficient marks of distinction, that the grant would be good without any name at all, there a mistake of the Christian name or surname, being only surplusage, will not vitiate, according to the rule *utile per inutile non vitiatur*; and therefore a grant to *George*, Bishop of Norwich, where his name is *John*; or to *Henry*, Earl of Pembroke, where his name is *Robert*, is good. (a)

Co. Lit. 3; 2 Roll. Abr. 43; 11 Saund. R. 340 a. || [(a) So in judicial proceedings. 1 Stra. 316.]

¶ Where the mayor, aldermen, bailiffs, and citizens of Carlisle declared in covenant on a deed made by the ancestor of the defendant, granting them a watercourse, by name of the "mayor and aldermen, and capital citizens of Carlisle," it was held that the corporation being a prescriptive one, and having had different names, the defendant was estopped by the deed from denying that the corporation was known by the name contained in the deed, at the time of the execution of it.

*Mayor, &c. of Carlisle v. Blamire*, 8 East, 487.

So, where a corporation, named "The wardein and poore of the hospital of the Holie Trinitie in Croydon, of the foundation of John Whitegift, Archbishop of Canterbury," conveyed land by the name of the "wardein and poore of the hospital of the Holie Trinitie in Croydon," the variance in the name was held immaterial.

*Croydon Hospital v. Farley*, 6 Taunt. 467; 2 Marsh. 174.

So the mayor, jurats, and commonalty of Rye were held to take lands under a devise to the "mayor, jurats, and town council of Rye."

*Attorney-General v. Mayor of Rye*, 7 Taunt. 546; 1 Moo. 267. ||

§ The misnomer of a corporation in a grant or obligation does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument be shown by proper and apt averments and proof.

*Alloways Creek v. String*, 5 Halst. 323. See *State v. New Jersey Turnpike Company*, 1 Har. 222. g

So, a grant to a man and his wife is good, without naming her by the name of baptism: so, if a grant be made to T and *Elen* his wife, where, in truth, her name is *Emlyn*, yet the grant is good; for being called the wife of T reduces it to a sufficient certainty.

Co. Lit. 3; 2 Roll. Abr. 43.

So, in a devise, though the Christian name be mistaken, yet, if there be a sufficient specification of the party, the devise is good; because it must be construed according to the intent of the devisor; and therefore if a devise be made to *Abraham*, the eldest son of B, where his name is *William*, this is a good devise.

Leon. 18. Vide tit. *Devise*.

But in pleading, in these cases, the Christian name ought to be shown;

(D) Mistakes in Grants, &c., and Judicial Proceedings.

for the death of the individual is a good plea in abatement, which often falls out where the same office, dignity, or relation continues in another.

Co. Lit. 3.

If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son, being of the same name with his father, grant an annuity, without any addition, yet the grant is good, for he cannot deny his own deed.

Perk. § 37.

If A be created an herald, and in the patent he be called *Chester*, a grant or obligation made to him by the name of *Chester*, is good; for this sufficiently distinguishes him from other men.

2 Roll. Abr. 44.

If a grant be made to a father and his son, he having but one son, the grant is good for the apparent certainty of it: but, if the father has several sons, or, if a grant be made to a man's cousin or friend, these are void for uncertainty.

Cro. Ja. 574.

If *J S*, reciting by his deed that his name is *J S*, by the same deed grants an annuity by the name of *Thos. S*, this is a good grant; for the writ shall be brought upon the whole deed.

Perk. § 40.

So, if *J S*, *knight*, reciting by his deed that he is a *yeoman*, grants an annuity, the grant is good.

Perk. § 43.

A grant to a duke's eldest son by the name of a *marquis*, or to the eldest son of a *marquis* by the name of an *earl*, &c., is good, because of the common courtesy of England, and their places in heraldry.

Carth. 400.

So, where a conveyance was made of a reversion to *Ralph Evers, knight, Lord Evers*, and he brought an action of covenant, to which the defendant pleaded, that at the time of the grant he was not *cognitus et reputatus per nomen mil.*, it was held to be no good plea; for the person is sufficiently expressed by *Lord Evers*, and the addition of *knight*, though false, doth not take away the description of the true person.

Bulst. 21; Cro. Car. 240, *Lord Evers v. Strickland*.

But it was adjudged in C. B., and affirmed by three judges in B. R., where the party set forth his title to an advowson, by virtue of letters patent granted to A, *tunc armigero et postea militi*, and upon oyer of the letters patent it appeared, that the grant was made to A, *knight*, that it could not be intended the same person, because knight is a name of dignity, but *armiger*, or esquire, a name of worship; and if he is afterwards made a knight, the name of esquire is thereby extinguished, and, consequently, that a grant made by the king to A, *knight*, when there was no such man a knight, was a void grant.

Carth. 440; 5 Mod. 297; 2 Salk. 560, pl. 3, *The King v. Bishop of Chester*. But *Rokeby, J.*, held, that he might take by a grant made unto him by the name of *knight*, *et sic vice versâ, si constat de personâ ut res magis valeat, &c.*—And note, this judgment was reversed in parliament, because it was only a mistake in the pleader, the party being in truth a knight at the time of the grant. Carth. 440.

§ A citation directed to a creditor under the act for the relief of poor  
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(E) At what Time the Mistake must be taken Advantage of, &c.

debtors, was directed to *Ebenezer B. S.*, the true name was *Edward B. S. Held*, to be a fatal error.

*Slasson v. Brown*, 20 Pick. 426.

An indictment against "the town of Dedham," instead of "the inhabitants of the town of Dedham," held to be sufficient.

*Commonwealth v. Dedham*, 16 Mass. 141.

The misnomer of a county will not vacate a patent for land.

*Stringer v. Young*, 3 Pet. 344.*g*

(E) At what Time the Mistake must be taken Advantage of, and how the same is solved.

It seems agreed, that he who would take advantage of a misnomer, or the want of a proper addition, must do it before he pleads to issue; for the addition is ordained by the statute, that the party who happens to be outlawed may have notice; but if he appears and takes no exception, *constat de personâ*, and he thereby waives any benefit he may have by the misnomer or want of addition.

Roll. Abr. 780; Cro. Ja. 609; 2 Roll. Rep. 225, Johnson's case; 2 Hal. Hist. P. C. 175; Sid. 247; Keb. 885; Show. 394; Comb. 188; Carth. 207; Lit. Ent. 509. {If he does not plead it in abatement, he cannot support an action against the officer who serves an execution issuing on the judgment recovered against him by the wrong name. 2 Str. 1218, Crawford v. Satchwell; 1 Mass. T. Rep. 76, Smith v. Bowker. See 6 Term, 234, Cole v. Hindson.} ¶ Taunton Market v. Kimberley, 2 W. Black. 1120; Rogers v. Boehm, 2 Esp. 702; ¶ 2 Smith v. Bowker, 1 Mass. 76; Gilbert v. Nantucket Bank, 5 Mass. 97; Kincaid v. Howe, 10 Mass. 205; Jewett v. Burroughs, 15 Mass. 469; Commonwealth v. Dedham, 16 Mass. 146; Porter v. Cresson, 10 S. & R. 257; Seely v. Boon, Coxe, 138; Scull v. Briddle, 2 Wash. C. C. R. 200; Mann v. Carley, 4 Cowen, 148; Pate v. Bacon, 6 Munf. 219. But one defendant cannot plead in abatement for a co-defendant. Atkinson v. Clapp, 1 Wend. 71; Waterbury v. Mather, 16 Wend. 611; and see tit. *Abatement*, D.*g*

The defendant was served with process by the name of *Dubois*, plaintiff entered an appearance for him, and obtained judgment by default; and on motion to set aside the judgment, upon an affidavit that his name was *Davois*, the court refused it, and said, that such kind of motions would destroy all pleas in abatement; since the last act enabling the plaintiff to appear for the defendant, his appearance by the name of *Dubois* is the same as if entered by the defendant himself.\*

Pasch. 7 G. 2, in *B. R. Halcock v. Dubois*; {3 East, 176, *Oakley v. Giles*, S. P.} \* If defendant is served by a wrong name, appears by his true name, and plaintiff declares against him by that name, the court will not, on motion, stay proceedings for irregularity, but leave defendant to plead variance.—So, if it is in the addition of his degree or mystery. 2 Wils. 293. {And if he pleads in abatement of the writ, and the plaintiff treats the plea as a nullity, and signs judgment, the court will not set it aside. So long as it is the practice of the court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken after appearance of a misnomer in the mesne process, which is out of the question after appearance. If, indeed, the plaintiff carry the same mistake into the declaration, the plea of misnomer will still be open to the defendant. 1 Bos. & Pul. 645, *Murray v. Hubbard*.}

{A defendant is estopped by the recognisance of bail entered into for him by the name in which he is sued from pleading a misnomer, though he himself be no party to the recognisance.

5 Bos. & Pul. 453, *Meredith v. Hodges*. Vide Willes, 461, *Smithson v. Smith*.}

¶ And a defendant is estopped by the recognisance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself be no party to the recognisance.

*Meredith v. Hodges*, 2 New R. 453; and see *Murray v. Hubbard*, 1 Bos. & P. 654.}]

(F) Taking Advantage of a Misnomer, &c.

§ No advantage can be taken at the trial of a misnomer of the plaintiff, though there be a person of the name erroneously used.

Moody v. Aslatt, 1 C. M. & R. 771; 5 Tyr. 492; 1 Gale, 47

A defendant waives an objection to a misnomer by taking out a judge's order, wherein he uses the name by which he was arrested.

Nathan v. Cohen, 3 Dowl. P. C. 370.g

(F) Of the Manner of taking Advantage of and pleading a Misnomer or Want of Addition.

ALTHOUGH a defendant may, by pleading in abatement, take advantage of a misnomer when there is a mistake in the writ or declaration, as to the name of baptism or (a) surname, yet in such a plea he must set forth his right name, so as to give the plaintiff a better writ.

Finch. 363; 9 H. 5, 1 pl. 3. (a) That the safest way in criminal cases is to allow the party's plea of misnomer, both as to his surname and as to his Christian name; for he that pleads misnomer for either, must in the same plea set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. 2 Hal. Hist. P. C. 176.—That the party accused may take advantage of the misnomer, or want of addition, but yet he must plead over to the felony; but though such plea be found for him, he is not to be discharged, but must be indicted over again; neither shall such plea, if found against him, be peremptory, but he shall be tried on his plea in chief. 2 Hawk. P. C. c. 34.

Also, he who pleads in abatement must not only set forth his right name, but must also allege, that by such name he was known and called at the time of the purchase of the writ.

Gouldsb. 86; Skin. 620, pl. 4; Salk. 6, pl. 15; 4 Mod. 347. § The plaintiff may reply that the defendant is as well known by the name used in the process as by the other. Petrie v. Woodworth, 3 Caines, 219; Goodenow v. Tappan, 1 Ham. 61.g

He who will take advantage of the misnomer of his Christian name, addition, or surname, must do it upon his arraignment; and the entry must be special, viz. *super quo venit Robertus Williams, qui indictatus est per nomen Johannis Williams, et dicit quod ubi in indictamento supponitur quod quidam Johannes Williams, vi et armis, &c. Ipsius nomen est Robertus et non Johannes*; for if he should say, *venit predictus Johannes Williams*, he concludes himself, and cannot plead that his name is Robert.

Hal. Hist. P. C. 175.

So, where the defendant pleaded misnomer in abatement in this form, *et predict. J. Germyn* (with an *n* at the end) *venit et defend., et dicit*, that his name is *Germyn* (without an *n*) and not *Germyn prout, &c.*, and upon demurrer to this plea it was adjudged against him; for that he had admitted his name to be *Germyn*, by his appearing and making defence by that name; but that if he would have taken advantage of the misnomer, he should have pleaded in this manner: *et Johannes Germyn, qui per nomen J. Germyn superius implacitatur, venit et dicit quod*; for this default a *respondeas ouster* was awarded.

Carth. 207, Tallent v. Germyn; [and see Roberts v. Moon, 5 Term R. 487; Docker v. King, 5 Taunt. 652; Tidd's Pract. 637, (9th ed.)]

So, where the defendant was sued by the name of *Edward Cotteral*, and pleaded in abatement that his name was *John*, but introduced his plea, and the aforesaid — Cotteral (leaving out his Christian name) comes and defends the force and injury, when, and so forth; it was held, that the defendant saying *et predict.* — Cotteral must be understood *et predict. Edwardus Cotteral*, by which he confesses his name to be Edward; and if

## (F) Taking Advantage of a Misnomer, &amp;c.

he would have taken advantage of the misnomer, he should have said, *et Johannes*, who was sued by the name of Edward.

Mich. 9 G. 2, in *B. R. Humberston v. Cotteral*; *β Mann v. Carley*, 4 Cowen, 148; *Gordon v. Hollida*, 1 W. C. C. R. 285.*g*

*β* Defendant pleaded that the plaintiff's Christian name was not inserted in the writ; plaintiff replied that he was as well known by his surname as by his Christian name. Held, bad.

*Labat v. Ellis*, 1 Tayl. 148.*g*

¶ And the defendant in a plea of misnomer in abatement must give his surname as well as his true Christian name, although his true surname be used in the declaration.

*Haworth v. Spraggs*, 8 Term R. 515; *Docker v. King*, 5 Taunt. 652.¶

If there be a mistake in the Christian name and surname, the defendant may take advantage of both, and his plea on that account shall not be held to be double; as, where trover was brought against the defendant by the name of *Christopher Mature*, and he pleaded in abatement, that his name was *John Metter*, and that he was known by that name; *absque hoc*, that he was named by the name of *Christopher Mature*; on demurrer to this plea, because of duplicity, and because no *venu* was laid where he was baptized, it was held, 1st, That there being a mistake in both names, the defendant could not take advantage thereof, in a better manner than he has done; for he is not bound to admit one of the names right, which if he did, he would not then give the plaintiff a better writ, the *prænomen* and *cognomen* being only one description of the same person; and though there is no precedent, where misnomer has been pleaded both in the Christian name and surname, yet that may be because it is a matter that has rarely happened; and for this were cited 1 Lutw. 10; Thom. Ent. 1; 1 Salk. 6. 2d, That there was no necessity of laying a *venu*, this being a matter relating to the person, which must be tried where the action is laid; and for this were cited Rast. Ent. 29; *Hern's Plead.* 9; 1 Salk. 6; 6 Mod. 115.

Trin. 10 G. 2, in *B. R. Read v. Mature*; *Cases temp. Hardw.* 286, S. C.

¶ No oyer is now grantable of an original writ, (a) the effect of which has been to prevent a plea in abatement of the writ for want of the defendant's addition; for no such plea can be pleaded until after oyer. (b) And it is unnecessary to insert the defendant's addition of place or degree in any declaration. (c)

(a) *Boats v. Edwards*, 1 Doug. 227. (b) *Deshons v. Head*, 7 East, 283. (c) *Gray v. Sidneff*, 3 Bos. & P. 395.

A bill of Middlesex and notice thereto describing defendant as Mr. A, without stating his Christian name, is irregular. (d)

(d) 1 Chitt. R. 398; and see 4 Moo. 317; 1 Bro. & B. 529.

And in the King's Bench, where the party arrested was described in the process and affidavit to hold to bail, by the initials of his Christian name only, the court ordered the bail-bond to be delivered up to be cancelled, and the defendant discharged upon entering a common appearance. (e) And in that court where the Christian name of the defendant is omitted in aailable writ, the court on motion will set it aside for irregularity; but where it is omitted in serviceable process, they will leave the party to his plea in abatement. (g) So, in the Common Pleas, if a defendant be arrested by the initials of his Christian name only, and sign a bail-bond in a similar manner, the court will discharge him on entering a common appearance, on



(G) Who may take Advantage thereof.

his undertaking to bring no action.(h) But where by a writ of *capias* the sheriff was directed to take Messrs. C and D, without mentioning their Christian names, and they afterwards signed a bail-bond in their Christian and surnames, the court held the irregularity waived,(i) and every subsequent writ of *alias*, &c. must correspond with that which has gone before in the names of the parties.(k) But a misnomer may be cured by altering the writ, and getting it re-sealed before the return.(l) And where process is sued out against four defendants, one of whom is misnamed, it may be served upon the three whose names are right; and if the name of the other be afterwards altered, and the writ amended, it is good against all.(m)

(e) 4 Barn. & A. 536. (g) 6 Barn. & C. 165. (h) 6 Moo. 264; and see 3 Bing. 296. (i) 4 Moo. 317; 1 Bro. & B. 529. (k) 3 Term R. 660. (l) 1 Chit. R. 321. (m) Ibid. 398 a.

When defendant has been arrested by wrong name, the court will order the bail-bond to be delivered up to be cancelled.(a)

(a) 4 Maul. & S. 360; 8 Moo. 526; 1 Bing. 424.

If a person enter into a bond by a wrong Christian name, and be sued thereon, he should be sued by that name, as a declaration against him by his right name, stating that he executed the bond by a wrong name, is bad.(b)

(b) 3 Taunt. 504; and see further, Tidd's Prac. 447, 449, (9th edit.); 2 Saund. R. 209 a, b, (5th edit.); ¶ *Scull v. Biddle*, 2 Wash. C. C. 200; *Meredith v. Hinadale*, 2 Caines, 362, *acc.* §

¶ An action against two defendants, one was arrested, and the other returned not found; in the declaration the defendant not found was called *John* instead of *George*, the plaintiff was nonsuited for the variance.

*Waterbury v. Mather*, 16 Wend. 611.

When the original process against a man is by a wrong name, it will not warrant his arrest; but an execution, when it follows the name of the original process, although by a wrong name, will authorize the officer to arrest the defendant.

*Griswold v. Sedgwick*, 6 Cowen, 456. §

(G) Who may take Advantage thereof.

THE defendant, though his name is mistaken, is not obliged to take (c) advantage of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is *una et eadem persona*.

(c) *J. Villars*, who pretended himself to be Earl of Buckingham, was arrested by the name of *J. Villars*, armiger; and, on motion, the court gave him leave to put in bail, without joining in the recognisance, and thereby not estop himself. *Salk.* 3, pl. 7, pl. 17; 7 *Mod.* 38.

So, if a person be indicted and acquitted of a crime, and afterwards be indicted for the same offence, in which second indictment the crime is described to be the same in substance, with some variation of the name, addition, &c., he may make good the variance, by averring that he was the same person meant in both.

2 *Hawk. P. C. c.* 35, § 3.

If a person killed be described by his proper name and surname in the first indictment, and by a different surname in the second, such variance may also be helped by an averment, that the person so differently named was one and the same person; to which it is advisable to add, that he was known as well by the name in the first, as by that in the second indictment.

2 *Hawk. P. C. c.* 35, § 3.

(A) What it is, how restrained, &c.

If a defendant appear *gratis*, and by attorney, to an information, he may plead a misnomer in abatement, as well as if he had appeared in person; for if he be not the person intended, his plea may be rejected, and judgment signed by *nil dicit*; but the attorney-general, by accepting his plea, admits him to be the defendant, and shall not afterwards say, that it doth not appear but that the plea might be put in by a stranger.

2 Hawk. P. C. c. 34, § 3.

One defendant cannot plead misnomer of his companion; for the other defendant may admit himself to be the person in the writ.

Lutw. 36; *Atkinson v. Clapp*, 1 Wend. 71. See *Waterbury v. Mather*, 16 Wend. 611.

So, if several persons be indicted for one offence, misnomer, or want of addition of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in law as several indictments.

2 Hal. Hist. P. C. 177.

β See title ABATEMENT, D.

## MONOPOLY.

(A) Monopoly, what it is, and how restrained by the Common Law.

(B) How restrained by Statute.

(A) Monopoly, what it is, and how restrained by the Common Law.

A MONOPOLY is described by my Lord Coke to be an institution or allowance by the king by his (a) grant, commission or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.

3 Inst. 181; Noy, 182. (a) Monopoly and engrossing differ only in this, that the first is by patent from the king, the other by act of the subject, between party and party; but are both equally injurious to trade, and the freedom of the subject, and therefore are equally restrained by the common law. Skin. 169.

And therefore all grants of this kind, relating to any known trade, are made (b) void by the common law, as being against the freedom of trade, discouraging labour and industry, restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniences to the public.

Hawk. P. C. c. 79, § 2. Townsend's Collection of Proceedings in Parliament, 244, 245. (b) And it is held to be further restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offence, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said, that there are precedents of prosecutions of this kind in former days. 3 Inst. 181; 2 Inst. 47, 61.

And upon this ground it hath been resolved, that the king's grant to any

(A) What it is, how restrained, &c.

particular corporation, of the sole importation of any merchandise, is void, whether such merchandise be prohibited by statute or not.

2 Roll. Abr. 214; 3 Inst. 182; 2 Inst. 61.

Hence also it seems, that the king's charter, empowering particular persons to trade to and from such a place, is void, so far as it gives such persons an exclusive right of trading, and debarring all others. And it seems now agreed, that nothing can exclude a subject from trade but an act of parliament.

Raym. 489; 2 Chan. Ca. 165; Vern. 127; *Sands v. East India Company*, Skin. 165, pl. 2, 226, 234; 3 Mod. 126.

Also, it hath been adjudged, that the king's grant of the sole making, importing, and selling of playing cards, is void; notwithstanding the pretence, that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is, in itself, lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than any other employment.

11 Co. 84; Moor, 671; Noy, 173; 2 Inst. 47.

And for the like reasons, also, it hath been resolved, that the grant of the sole engrossing of wills and inventories in a spiritual court, or of the sole making of bills, pleas, and writs in a court of law, to any particular person, is void.

2 Roll. Abr. 212; Jon. 231; 3 Mod. 75; Vern. 120, 130; 10 Mod. 107, 131, 133.

But it seemeth clear, that the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented, or first brought into the realm, by the grantee.

Noy, 182; Hawk. P. C. c. 79, § 6.

Also, it seems to be the better opinion, that the king may grant to particular persons the sole use of some particular employments, (as of (a) printing the Holy Scriptures, and law-books, &c.) whereof an unrestrained liberty might be of dangerous consequence to the public.

Mod. 256; 3 Keb. 792; 3 Mod. 75, and the authorities to the last paragraph but one. (a) The reasons hereof given are, that the invention of printing was new; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, and none could make proclamations but the king; that as to law-books, the king has the making of judges, serjeants, and officers of law; that they are printed in a particular language and character, with abbreviations, &c. Vide 2 Chan. Ca. 67; Skin. 234. ¶ See, as to the copyrights grantable by the crown, tit. *Prerogative* (F), and Godson on Patents and Copyright, b. 3.¶

¶ Where a monopoly is intended for the public good, it cannot be exercised by the grantee for his mere private advantage, without regard to the rights and interests of the public. Therefore, where the London Dock Company having built warehouses in which wines were deposited, upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the board of treasury under the warehousing act, 43 G. 3, c. 132, whereby it became lawful for the importers to lodge and secure wines there without paying the duties in the first instance, and it did not appear that there was any other place in the port of London where the importers had a right to bond their wines; it was held that such monopoly was enjoyed by them for the public benefit, and that they were bound by law to receive the goods into their warehouses for a *reasonable* hire and re-

## (B) How restrained by the Statute.

ward. Q<sup>a</sup>. whether, having accepted such certificate, they could afterwards repudiate it at pleasure?

Allsett v. Inglis, 12 East, 527.]

## (B) How restrained by the Statute.

By the 21 Jac. 1, c. 3, it is declared and enacted, "That all monopolies, and all commissions, grants, licenses, charters, and letters-patent to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of any thing within this realm, or Wales, or of any other monopolies, and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters whatsoever, any way tending to the instituting, strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void, and of none effect, and in nowise to be put in ure and execution."

And § 2, "That all persons, bodies politic and corporate whatsoever, shall be disabled and incapable to have, use, exercise, or put in ure any monopoly, or any such commission, grant, or license, &c., or other thing tending as aforesaid, or any liberty, power, or faculty, grounded or pretended to be grounded upon them or any of them."

And it is further declared and enacted, by § 3, "That all monopolies and all such commissions, grants, and licenses, &c., and all other things tending as aforesaid, and the force and validity of them, ought to be and shall be examined, heard, tried, and determined by and according to the (a) common laws of this realm, and not otherwise."

(a) In the construction hereof it is held by my Lord Coke, that all matters of this kind ought to be tried in the courts of common law only; and not at the council-table, or in the Court of Chancery, or any other court of like nature. 3 Inst. 132. But for this vide Jurisdiction of the Court of Chancery, tit. *Courts and their Jurisdiction*.

And it is further enacted, by § 4, "That if any person shall be hindered, grieved, disturbed, or disquieted, or his goods or chattels any way seized, attached, distrained, taken, carried away, or detained by occasion or pretext of any monopoly, or of any such commission, grant, or license, &c., or other matter or thing tending as aforesaid, and will sue to be relieved in any of the premises, he shall have his remedy for the same at the common law, by action grounded on the said statute, to be heard and determined in the King's Bench, Common Pleas, or Exchequer, against the party by whom he shall be so hindered or grieved, &c., or by whom his goods shall be so seized or attached, &c.; wherein every such person, which shall be so hindered or grieved, &c., or whose goods shall be so seized or attached, &c., shall recover three times so much as the damages which he sustained by means of such hinderance, &c., and double costs; and in such suits, or for the staying or delaying thereof, no essoin, protection, wager of law, aid-prayer, privilege, injunction, or order of restraint, shall be in anywise prayed, granted, admitted, or allowed, nor any more than one imparlance; and if any person shall, after notice that the action depending is grounded upon the said statute, cause or procure any action at the common law grounded thereon to be stayed or delayed before judgment, by colour or means of any order, warrant, power, or authority, save only of the court wherein such action shall be depending; or after judgment shall cause or procure the execution to be stayed or delayed by colour or means of any order, warrant, prayer, or authority, save only by writ of error or attain, that then the said person or persons so offending shall incur a *præmunire*."

(B) How restrained by the Statute.

It is said, that the first branch of this last clause, relating to the delay of causes of this kind before judgment, not only extendeth to the Privy Council, Chancery, Exchequer Chamber, and the like, but also to those who shall procure any warrant from the king for such purpose; and it is said, that the latter branch, relating to the delaying of execution after judgment, extendeth even to the judges of the court where the cause is depending.

3 Inst. 183.

But it is provided by § 6, "That no declaration, in the statute mentioned, shall extend to any letters-patent, and grants of privilege for the term of fourteen years, or under, of the sole working or making of any manner of (a) new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use; so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent, or grant of such privilege, but that the same should be of such force as they should be if the said act had never been made, and of none other."

(a) Manufactures newly brought into the realm from beyond sea are included, though they had been long practised there before; for the statute speaks of new manufactures within this realm, and was made to encourage new devices useful to the kingdom; and whether learned by travel or study, it is the same thing. 2 Salk. 447. [A mere scientific principle does not come within the word "manufacture," and cannot be the subject of a patent. *Boulton v. Bull*, 2 H. Bl. 463; *Hornblower v. Boulton*, 8 Term R. 98; *Rex v. Wheeler*, 2 Barn. & A. 345; *Hull v. Thompson*, 2 B. Moo. 451.]

It hath been resolved, that no new invention, concerning the working of any manufacture, is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one. (b)

3 Inst. 184. {See 2 H. Black. 488.} [(b) As to the novelty requisite, see *Rex v. Arkwright*, Dav. Pat. Ca. 129; *Manton v. Moore*, Ibid. 333; *Brunton v. Hawkes*, 4 Barn. & A. 540; *Thompson v. Forman*, 2 B. Moo. 424; *Rex v. Cutler*, 1 Stark. Ca. 354, and see 3 Mer. 629; and that the invention must not have been previously used, see *Wood v. Zimmer*, 1 Holt. Ca. 58. If an improvement is made by adding new combinations to an old machine, the patent must be only for the new part. *Bovill v. Moore*, Dav. Pat. Ca. 361; 2 Marsh. 211.]

Also, it hath been holden, that a new invention to do as much work in a day by an engine as formerly used to employ many hands, is not within the said exception, because it is inconvenient, in turning so many labouring men to idleness.

3 Inst. 184.

Also, it seems clear, that no old manufacture, in use before, can be prohibited in any grant of the sole use of any such new invention.

3 Inst. 184.

And it is further provided, § 7, "That nothing in the said act contained shall extend to any grant or privilege, power or authority whatsoever, before the said act made, granted, allowed, or confirmed by any act of parliament, so long as the same shall continue in force."

Provided also, § 9, "That nothing in the said act contained shall be in anywise prejudicial to any city, borough, or town corporate within this realm, concerning any grants, charters, or letters-patent to them made, or concerning any custom used by or within them, or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies or societies of merchants within this realm, erected for the

## (B) How restrained by the Statute.

maintenance, enlargement, or ordering of any trade or merchandise, but that the same charters, customs, corporations, &c., and their liberties and immunities, shall be of such force and effect as they were before the making of the said act, and of none other; any thing before in the said act contained to the contrary in anywise notwithstanding."

And it is further provided, § 10, "That nothing in the said act contained shall extend to any letters-patent, or grants of privilege concerning printing, nor to any commission, grants, or letters-patent concerning the digging, making, or compounding of saltpetre, or gunpowder, or the casting or making of ordnance, or shot for ordnance; nor to any grants or letters-patent of any office erected before the making of the said statute, and then in being and put in execution, other than such offices as had been decreed by proclamation; but that all such grants, &c., shall be of the like force and effect, and no other, as if the said act had never been made."

But it is enacted, by 16 Car. 1, c. 21, "That it shall be lawful for all persons, as well strangers as natural-born subjects, to import any quantities of gunpowder whatsoever, paying such customs and duties for the same as by parliament shall be limited; and that it shall be lawful for all his majesty's subjects of this realm of England to make and sell any quantities of gunpowder at his pleasure, and also to bring into this kingdom any quantities of saltpetre, brimstone, or any other materials for the making of gunpowder; and that if any person shall put in execution any letters-patent, proclamations, edict, act, order, warrant, restraint, or other inhibition whatsoever, whereby the importation of gunpowder, saltpetre, brimstone, or other the materials aforementioned, shall be any ways prohibited or restrained, he shall incur a *præsumptio*."

And it is further provided by the said statute of 21 Jac. 1, c. 3, § 11, 12, "That nothing in the said act contained shall extend to any commission or grant concerning the digging, compounding, or making of alum or aluminas, &c., nor concerning the licensing of the keeping of any tavern or selling of wines, to be spent in the mansion-house, or other place in the tenure or occupation of the party selling the same; and a further provision is made in the latter part of the statute, for some particular grants to particular corporations and persons, as "*Newcastle-upon-Tyne*," &c.

But it is said, that the said clause relating to alum was needless, because all such mines belong, of course, to the persons in whose grounds they are, and therefore no privilege concerning them can be granted but in the king's own ground.

3 Inst. 185.

|| See farther, as to Patents, tit. "PREROGATIVE" (F.) and Godson on Patents, *passim*; || Fessenden on Patents; Carpmæl on Patents; Collier on Patents; Davies' Collection of Cases on the Law of Patents; Drewry's Patent Law Amendment Act; Hand on Patents; Holroyd on Patents; Rankin's Analysis of the Law of Patents; Smith's Epitome of the Law of Patents; Perpigna on the French Law of Patents, originally written in English.

# MORTGAGE.

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- (A) Of the Original and several Kinds of Mortgages : [And herein of Mortgages by Deposit of Deeds.]
  - (B) What shall be deemed a Mortgage, or an Estate redeemable.
    - β 1. *What shall be deemed a mortgage.*
    - 2. *What shall not be deemed a mortgage.*
  - (C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.
  - (D) Of the legal Performance of the Condition.
  - (E) Of the Equity of Redemption and Foreclosure : And herein,
    - 1. *Who may redeem, and by whom the Mortgage Money shall be paid.*
    - 2. *To whom the Mortgage Money shall be paid.*
    - 3. *Of the Precedency and Right of Redemption, where there are several Mortgagees or Encumbrancers : And herein of their Remedies against each other, as well as against the Mortgagor.*
    - 4. *How far the purchasing in a precedent Mortgage or Encumbrance will protect such Purchaser, and entitle him to a Precedency of Redemption.*
    - 5. *Of the Equity which must be done by him who would redeem to the Person against whom a Redemption is prayed.*
    - 6. *At what Time the Redemption must be.*
    - 7. *Of the Manner of Redeeming and Foreclosing.*
  - (F) Mortgagees and their Assignees, how to account, and what Allowances to make.
  - β (G) Of Mortgages of Personal Property.
  - (H) Of Disputes among Mortgagees.
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- (A) Of the Original and several Kinds of Mortgages : [And herein of Mortgages by Deposit of Deeds.]

THE notion of mortgaging and redemption seems to be of Jewish extraction, and from the Jews derived to the Greeks and Romans : the plan of the Mosaic law constitutes a just and equal agrarian, that the lands may continue in the same tribes and families, and the people might not be diverted by any exotic acts and inventions from the exercise of agriculture, in which innocent employment they were to be continually educated ; and therefore whoever were compelled by want to sell, could transfer no estate in the lands farther than to the next general jubilee, which returned once in fifty years ; wherefore they computed till the jubilee, and according to the distance from thence such was the interest that could be transferred to the buyer. But the vendor had power at any time to redeem, paying the value of the lands to the jubilee. But though he did not redeem at the year of jubilee, yet the lands then came back again free to the vendor and his heirs.

Camæus, 11, 12. [See Mr. Buller's note, Co. Lit. 205 ; Justin. Cod. l. 4, t. 54, § 2, 7.]

But our notion of mortgaging and redemption seems to have come more

'A, Of the several Kinds of Mortgages.

immediately from the civil law, and therefore it will be necessary herein to consider the distinctions in that law between pledges and things hypothecated.

*Justin. 502.*

The *pignus* or pledge was, when any thing was cōtinged for money lent, and the possession passed to the creditor.

A *Pignus* is derived from *pignum*, the fast, because what is delivered in pledge is delivered in hand. Dig. 50, 16, 238, 2.<sup>d</sup>

The *hypotheca* was, when the thing was obliged for money lent, and the possession remained with the debtor. Now in case of goods pledged, the creditor was obliged to the same diligence in keeping them as he used about his own; so that if the goods were lost by the negligence of the creditor, an action lay as for a deposit; for the property being transferred to the creditor for a particular purpose, he was to keep them as his own.

*Vide ut. Ballment, § and tit. Merchant and Merchantile, G. See also Fish. De Hypothecis; Proth. Mar. Contr. translated by Cushing, note 36, p. 145; Commercial Code of France, translated by Rodman, note 52, p. 351; Merl. Rép. mot Hypothèque; 2 Herman's Civ. Law, 195; Ayl. Pand. 524; 2 Bell's Com. 25, 5th ed.; 1 Law Tracts; Henry, Hailm. § 244; Bouv. L. D. h. 19.*

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria*, which, when he had pursued, and obtained sentence thereon, he might sell the pledge as his own property. But there was this difference between the *actio pignoratitia* and *hypothecaria*; that the *actio pignoratitia* was only on the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor; but the *actio hypothecaria* was *tam in rem quam in personam*, and was given *ad pignus prosequendum contra quemcumque possessorem*; because herein the creditor had not the possession of the pledge, but it remained to the debtor. Until sentence was obtained in these actions, the creditor could not obtain the property of the pledge; and if the money was paid before sentence, the pledge was subject to redemption; and where the same thing was pledged to several, those were said to be *potiores in pignore* to whom the things were first hypothecated.

*Ingenit. lib. 20, tit. 6; Corvin. 269, 270, 271.*

If the money was tendered or paid to the creditor, the contract of *pignoratitia* was dissolved, and the debtor might have the pledge back as a thing lent. This action to have introduced the notion among us of the debtor's right to redemption. And with them the usucaption or the right of prescription did not extinguish the pledge, unless a stranger had held it for thirty years, or the debtor had held it for forty years.

*Ingenit. lib. 20, tit. 6.*

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non sibi subjuvantur hypotheca, quamvis fructus posse esse, receptum est*. And the reason of this rule was, because the feud was filled with a tenant from the lord's original bounty, on whom he depended for his personal service in war and peace; and therefore the feudiary could not obtrude a tenant on him without his leave, who might be less capable of those services; and as the landlord could not originally alien without license, so he could not hypothecate.

*1. n. 244.*

But when a license of alienation was given about the time of H. 3, and



## (A) Of the several Kinds of Mortgages.

it became a maxim in law, that the purity of a fee-simple imported a power of disposing of it as the owner pleased ; there were two ways of mortgaging lands introduced, which Littleton distinguishes by the names of *vadum vivum* and *vadum mortuum*.

The *vadum vivum* is, where a man borrows 100*l.* of another, and makes an estate of lands to him, till he hath received the said sum of the issues and profits of the lands ; and it is called *vadum vivum* because neither the money nor the land dieth ; for the lands are constantly paying off the money, and the lands are not left as a dead pledge, in case the money be not paid. This seems to have been the ancient way of pledging lands ; for they held, that lands could not be hypothecated ; and therefore they used to subject the *usufructus*, which continued originally during the life of the feodary ; but when there was a free liberty given of alienation, then the feodary could pledge the *usufructus* of the land at pleasure. But because, in this way of pledging, the lender received his money by degrees, and in small parcels, which was very troublesome ; and those that put money to usury are generally willing to receive the whole in a gross sum ; therefore this way of pledging is now out of use.

Co. Lit. 205. Vide Mad. Formulæ, 136.

The *vadum mortuum* is so called by Littleton, because it is doubtful whether the feoffor will pay the money at the day limited or not ; and if he do not pay, then the land, which is but in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him ; and if he do pay it, then the pledge is dead to the tenant of the land.

Lit. § 332 ; Co. Lit. 205.

Of these mortgages there are again two sorts : 1st, Of the freehold and inheritance ; and 2d, Of terms for years.

Mad. 318, 319.

1st, Of the freehold and inheritance ; and here the ancient way was to make a charter of feoffment, on condition, that if the feoffor, or his heirs, paid the sum to the feoffee, or his heirs, he should re-enter and re-possess ; and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by another charter, as may be seen in the old forms.

For as a man might annex a condition to his feoffment, for *cujus est dare, ejus est disponere*, so he might annex a condition by another deed, bearing date and executed at the same time ; for, being executed at the same time, it is really but one and the same disposition, *que incontinenti fiunt inesse videntur*. A defeasance or condition annexed indeed after the feoffment executed comes too late, because the livery *coram paribus* attesting the infeudation, in which there is no condition, the tenant must hold the land according to the tenure of the investiture : but rents, annuities, or warranties, that are things executory, may be defeated by defeasances made at the time of their creation, or any time after ; because there is not any necessity of the notoriety of livery to make an investiture ; and therefore, being created by deed only, they may be defeated or destroyed by deed alone.

Co. Lit. 226, 227.

These sorts of conveyances were subject to these inconveniencies ; that if the money were not paid at the day, so that the estate became absolute, the estate was thenceforth subject to the dower of the feoffee, and all other his real charges and encumbrances ; for though if the feoffor performed the

## (A) Of the several Kinds of Mortgages.

condition, then he might re-enter, and re-possess himself in his former estate, and, consequently, was in above all the charges and encumbrances of the feoffee; yet, if he did not literally perform the condition, by payment of the money at the day, then the estate was legally subject to the charges and encumbrances of the feoffee, though the money were afterwards paid, and the estate re-conveyed to the feoffor.

Co. Lit. 221, 222.

But the courts of equity, as they grew in power, have set this matter right, and have maintained the right of redemption, not only against tenant in dower and the persons who come in under the feoffee, but even against the tenant by the courtesy, and lord by escheat, that are in the *post*; because the payment of the money doth, in the consideration of equity, put the feoffor in *statu quo*, since the lands were originally only a pledge for the money lent.

Hard. 465.

As to mortgages by way of creating terms, this was formerly by way of demise and re-demise. As for example: A borrowed money of B, thereupon A would demise the land to B for a term of 500, &c. years absolutely, with common covenants against encumbrances, and for farther assurance, and then B would the day after re-demise to A for 499 years, with condition to be void on non-payment of the money at the day to come: this manner of mortgaging came in after the 21 H. 8, c. 15, for falsifying recoveries, when there was a fixed interest settled in terms for years; and was esteemed best for the mortgagor, to avoid all manner of pretension from the encumbrances and dower of the feoffee in mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure, and was only inconvenient in this, that if the second deed were lost, there appeared to be an absolute term in the mortgagee.

But the common method now is this, viz.: by a demise of the land for a term, under a condition to be void on the payment of the mortgage-money and interest; and a covenant is inserted at the end of such deeds, that, till the default shall be made in the payment of the money, the mortgagor shall receive the rents, issues, and profits, without account.

This has been ruled to create a tenancy at will (a) to the mortgagee; but if the mortgagor dies, the tenancy at will is determined till there is a receipt of interest from the heir, which seems to make him also tenant at will to the mortgagee.

Raym. 147. [(a) The mortgagor is only like a tenant at will to the mortgagee; his legal interest is inferior to that of a strict tenant at will. Dougl. 22, 282, 283.] [The relation of mortgagor and mortgagee is analogous in many points to other characters known to the law, but differing in some points from all. Mr. Justice Buller has observed, "It is quite sufficient to call them mortgagor and mortgagee, without having recourse to any other description, or to what they are most like." Birch v. Wright, 1 Term R. 383; and vide the observations of the Master of the Rolls, in Cholmondeley v. Clinton, 2 Jacob & Walker, 179, 183. It is decided, that the mortgagor may be described in pleading as the tenant of the mortgagee. Patridge v. Bere, 5 Barn. & A. 604. His legal interest, after default, is that of a tenant by sufferance, not of a tenant at will. Doe v. Maisey, 8 Barn. & C. 767; he may be ejected without notice, Ibid.; as may his tenant, let in after the mortgage; and this either by the original mortgagee, or by his assignee. Thunder v. Belcher, 3 East, 449; whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will. 4 Term R. 680; and he is not entitled to the growing crops after the will is determined, as is the case of a tenant at will. 1 Term R. 383. There appears no ground for considering him tenant at sufferance before payment of interest, and tenant at will afterwards. See

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Coote's Law of Mortgages, 328, 329. The receipt of interest by the mortgagee has no resemblance to the receipt of rent by a landlord, so as to amount to an acknowledgment of tenancy; and the mortgagor may be ejected without notice, and without the privilege of reaping his growing crops, equally before payment of interest and afterwards. That the mortgagor cannot accurately be called a *receiver* for the mortgagee, vide 1 Term R. 383; *Ex parte Wilson*, 2 Ves. & B. 252. Nor are the characters of *cestui que trust* and trustee strictly analogous; for in general a trustee is not allowed to deprive his *cestui que trust* of the possession, but the mortgagee may assume the possession when he pleases, and equity will not restrain him. 2 Meriv. 359. It appears, according to the language of the Master of the Rolls, 3 Ja. & Walk. 183, that "the relation is perfectly anomalous, and *sui generis*."¶

But now the last and best improvement of mortgages seems to be, that in the mortgage deed of a term for years, or the assignment thereof, the mortgagor shall covenant for himself and his heirs, that if default be made in the payment of the money at the day, then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct or appoint; for the reversion, after a term of 50 or 100 years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, and subject to forfeiture, &c., and not capable of the privileges of a freeholder; therefore, where the mortgagor cannot redeem the land, it is but reasonable the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner.

¶ For the definition of a mortgage, see 1 Watts, R. 140; *Erskine v. Townsend*, 2 Mass. 493; *Cruise*, Dig. t. 15, c. 1, s. 11; 1 Pow. on Mortg. 4 a, n.; *Bouv. L. D. h. v. g*

¶ There is another species of security which partakes of the nature of a mortgage, as there is an estate due and estate given as security for the repayment, but differs from it, in the circumstances that the rents and profits are to be received without any account until the principal money is paid off, and there is no remedy to enforce the payment, while the mortgagor has a perpetual right of redemption. This is known by the name of a *Welch mortgage*. It is a species of *vivum vadium*: strictly, however, there is this difference between a Welch mortgage and a *vivum vadium*; in the latter the rents and profits of the estate are applied to the discharge of the principal, after paying the interest; while in the former, the rents and profits are received in payment of the interest only.

1 Pow. Mortg. 373, n.; *Bouv. L. D. Welch mortgage*.

A, being entitled in fee to a freehold estate in remainder, expectant on the decease of B, demised his interest to C for a term of five hundred years, subject to a proviso for redemption on payment of the sum of £1000 and interest, without any time by the proviso for the payment of the money. The deed contained a covenant by A for payment of the money on demand, and also a covenant that it should be lawful for B to enter into the possession of the property, to hold and enjoy the same until the payment of the principal money and interest. Held, that the mortgage was in the nature of a Welch mortgage; and a bill of foreclosure filed by B, against a person to whom A has conveyed his reversionary interest, was dismissed, but without cost.

*Teulon v. Curtis*, 1 Young, 610. g

¶ **POWERS OF SALE.** ¶—[Great inconvenience having been suffered by mortgagees, from the difficulty and delay attending bills to foreclose, a mode of contracting has been invented, by which the mortgagee may, after a given

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time, procure his principal and interest, by a sale of the mortgaged estates, without being under the necessity of applying to a court of equity. This is done by taking a conveyance of the fee to trustees in trust for the mortgagee for a term of years subject to redemption, with remainder to the trustees in trust, in default of payment at the time stipulated, to sell the estate, and to apply the purchase-money, after defraying the expenses incurred in discharging the trust, in payment of the mortgage money, and interest, and then to pay over the residue to the mortgagor.

1 Pow. Mortg. 12.]  $\beta$  See Van Bergen v. Dumarest, 4 Johns. Ch. 37; Doolittle v. Lewis, 7 Johns. Ch. 45; Brinckerhoff v. Lansing, 4 Johns. Ch. 65. $\gamma$  {See 1 East, 293, 294; 1 Hen. & Mun. 29; 1 Cain. Er. 1, 3.}

{The deposit of title-deeds as a security for a debt amounts to an equitable mortgage; and the possession of the deeds is, if no other purpose is shown, evidence of an agreement that the estate itself shall be a security; and that agreement will be carried into execution in equity against the mortgagor, or any who claim under him, with notice, either actual or constructive, of such deposit having been made.

1 Bro. C. C. 269, Russell v. Russell; 2 Dick. 759, Pye v. Daubuz; 2 Anstr. 427, Birch v. Ellames; Ibid. 432, Plumb v. Fluitt; 2 East, 486, Doe v. Hawke; 9 Ves. J. 115, *Ex parte* Coming; 11 Ves. J. 398, *Ex parte* Wetherell; Ibid. 403, *Ex parte* Haigh; 12 Ves. J. 6, *Ex parte* Morgan; Ibid. 192, Norris v. Wilkinson. See 1 Johns. Ca. 116, Jackson v. Dunlap; 5 Esp. Rep. 105, Doe v. Roe.}

[[Doubts have been entertained of the validity of these powers of sale without the concurrence of the mortgagor, or the sanction of a court of equity; but these doubts are now removed by two express decisions, which have established that the concurrence of the mortgagor in the sale is unnecessary; that his covenant with the mortgagee to join in a conveyance is not a contract of which a purchaser is entitled to the benefit; that a specific performance will be decreed against a purchaser who refuses to complete his purchase on account of the non-concurrence of the mortgagor; and that if a purchaser make such mortgagor a party to a bill for a specific performance, in order to procure his concurrence, his bill will be dismissed against the mortgagor, with costs.

Clay v. Sharpe, Lib. Reg. Mich. 1802, fo. 66; Sugden, V. & P. App. 20; Cruise, Dig. 2, 105; Corder v. Morgan, 18 Ves. 344; and see Clay v. Willie, 1 Barn. & C. 364.

$\beta$ In New York, mortgages generally contain a power of sale, or summary foreclosure.

Wilson v. Troup, 2 Cowen, 195; S. C. 4 Johns. Ch. 37.

The power to sell on default of payment, contained in a mortgage, is a power with an interest, and does not die with the mortgagor.

Bergen v. Bennett, 1 Caines' Cas. Exr. 1. $\gamma$

**MORTGAGES BY DEPOSIT OF DEEDS.**—A peculiar species of mortgage has been allowed in modern times, and is now in frequent practice, viz.: a mortgage by deposit of title-deeds. The case of Russell v. Russell, 1 Bro. C. C. 269, is said to be the first case( $\alpha$ ) in which it was decided that a mere delivery of the deeds of an estate, as a security for a loan, had the full effect of an equitable mortgage. The same principle was acted on by Lord Thurlow in the cases of Featherstone v. Fenwick, and Harford v. Carpenter, and is now the settled doctrine of courts of equity. The principle has, however, been repeatedly and strongly disapproved by subsequent judges, as being in direct contravention of the statute of frauds, 29 Car. 2, c. 3, § 4, in

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letting in parol testimony as to the terms and intention of the deposit, and opening a door to all the fraud and perjury which the statute meant to exclude. Lord Eldon has considered the decisions on the subject as amounting to a *repeal* of the statute; and Sir William Grant has expressed strong disapprobation of them; and both these judges, in admitting the doctrine to be now settled, have expressed their determination not to extend it beyond its present limits.

1 Bro. C. C. 269; *11 Rawle*, 328; 5 Wheat. 284; 1 Cox, R. 211; 2 Story, Eq. Jur. § 10, 20. (a) *Fitzjames v. Fitzjames*, Finch, 10, (1673) is earlier; 1 Bro. C. C. 269, note (a); *Ex parte Whitbread*, 19 Ves. 212; 1 Rose, 300; *Ex parte Haigh*, 11 Ves. 403.

The deposit must be made for the purpose of a present and immediate security, and not for any other object; and therefore, where the deeds were deposited merely for the purpose of a mortgage being prepared, and it was prepared but not executed, by reason of the death of one of the mortgagors, Sir William Grant held, that the deeds not being delivered by way of immediate *pledge*, this was not an equitable mortgage.

*Norris v. Wilkinson*, 12 Ves. 192; et vide *Ex parte Hooper*, 1 Mer. 7.

The deposit will create an equitable mortgage for the debt *actually due*, although not a word passes at the time of the delivery.

*Ex parte Mountfort*, 14 Ves. 606; *Ex parte Langston*, 17 Ves. 230; *Ex parte Kensington*, 2 Ves. & B. 83; *Monkhouse v. Corporation of Bedford*, 17 Ves. 381.

But a written agreement is always advisable.

*Norris v. Wilkinson*, 12 Ves. 197.

And if it appears clearly upon evidence, or oath uncontradicted, that such was the agreement, the deposit may be a security for future advances, as well as for the sum actually due. But Lord Chancellor Eldon disapproved of his decisions in thus extending the original doctrine, and said, that at all events it is not to be further enlarged.

*Ex parte Langston*, *supra*; and see *Reid v. Tait*, Powell, Mort. 1052 b, (6th ed.); *Ex parte Lloyd*, 1 Glyn. & J. 391; *Ex parte Hooper*, 1 Mer. 9.

The deposit may be made either with the creditor himself, or with some third person over whom the depositor has no control; but it is not sufficient to deposit the deeds with the wife of the depositor, although they remain in a trunk of which the key is kept by her. Nor must they remain in the possession of the debtor, although he give a memorandum of deposit to the creditor; and deeds deposited with one person cannot be made a security for money due to another, unless the person holding the deeds be merely a trustee, and have not himself made any advance.

*Ex parte Coming*, 9 Ves. 115; *Ex parte Whitbread*, *supra*.

An equitable mortgage by deposit of title-deeds shall have preference over a subsequent purchaser or mortgagee of the legal estate, *with notice*; and a purchaser was held affected with notice where the vendor had acknowledged that the deeds were in possession of another; for it was *crassa negligentia* that he did not make inquiry; and in this case the lord chancellor said, that so much was the equitable title from the possession of the deeds recognised at law, that if a man having made the deposit previously, makes a title accordingly, only two minutes before he absconds, it is a legal title, and cannot be impeached; for though the legal act was done in contemplation of bankruptcy, it is protected by the previous equitable title.

*Hiern v. Mill*, 13 Ves. 114.

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When the deposit is made for a particular purpose, that purpose may be enlarged by a subsequent agreement, without a re-delivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended to advances made after a change of partners.

*Ex parte Kensington*, 2 Ves. & B. 79.

A deposit by an agent, though in excess of his authority, may become an equitable mortgage if adopted and recognised by the principal.

*Hope Insurance Company v. Mannings*, Powell, 1056 c, (6th edit.)

Whether it is necessary that the deposit should include *all the title-deeds*, appears a somewhat doubtful question. In *Ex parte Wetherell* the deeds deposited only affected a moiety of the estate, and brought the title down ours to 1725, and the remainder were retained by the depositors, and came to their assignees on their bankruptcy. But it appeared that the mortgagees understood that the deeds related to the entirety; and as there was evidence in writing that the intention was to give a security on the whole estate, the lord chancellor decided expressly, *on the ground of the written evidence*, that the deposit had that effect.

*Ex parte Wetherell*, 11 Ves. 398.

In a subsequent case, A deposited his title-deeds, save the conveyance to himself, with B, and afterwards deposited the deed of conveyance with C, and became bankrupt. B and C, and the assignees, contended for priority; but Lord Eldon decided, that neither B nor C, nor both together, had an equitable mortgage.

*Ex parte Pearson and Protheroe*, 1 Buck. 525.

A parol agreement, to deposit a lease when granted as a security for an advance, will not constitute an equitable mortgage.

*Ex parte Combe*, 4 Madd. 249.

An equitable mortgage of copyholds may be created by a deposit of a copy of court-roll.

*Ex parte Warner*, 19 Ves. 202; 1 Rose, 287.

It should seem that if there be a written instrument, stating the terms on which a deposit is made, an inference contrary to it, founded on affidavit alone, will not be admitted. Such, at least, appears to be the principle on which the case of *Ex parte Combe* was decided. The case is not very accurately reported, but it should seem the facts were as follows:—Meux and Co. were creditors of Morgan, who for their security had executed a warrant of attorney to confess judgment, and had deposited the lease of his house with them. In January, 1810, Meux and Co. entered up judgment, and levied execution for 1560*l.* 6*s.* 5*d.* Morgan applied to Combe and Co. to lend him money to satisfy Meux and Co., and to supply him with beer, which they agreed to do; and Morgan, on the 20th of January, 1810, executed to them a warrant of attorney, with a defeasance, stating that Combe and Co. had that day lent him 1250*l.*, and that he had deposited with them the lease of the house, as a collateral security for the 1250*l.*, and further advances not exceeding 1500*l.* On the same day Combe and Co. paid off Meux's debt, and satisfied the law charges and sheriff's poundage, amounting in the whole to 1252*l.*; and thereupon Meux and Co. delivered to them the lease. On the 14th of August, Combe and Co. entered up judgment against Morgan, and levied execution for 1420*l.* 14*s.* But a commission of bankrupt issuing against him on that day, they withdrew their execution, and proved part of the debt for beer delivered, as a debt

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under the commission, and presented a petition, praying a sale of the leasehold premises for the payment of the residue of their debt; and they contended, that having paid off Meux and Co., they were entitled to stand in their place. An important fact is omitted in the report; viz., the time when the act of bankruptcy took place, but it must be presumed to have occurred previously to the 20th of January, 1810, for otherwise there seems no good reason why Combe and Co. might not have rested on the strength of the deposit made to themselves. The lord chancellor, however, dismissed the petition, on the ground that the petitioners were bound by the recital in the defeasance, viz., *that Morgan had deposited the deeds*.

*Ex parte Combe*, 17 Ves. 369.

If the creditor by his bill, or in case of bankruptcy by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor deny the fact, the court will direct an inquiry by the master, or by the commissioners of bankrupt, in respect of what debt the deposit was made.

*Ex parte Mountfort*, *supra*.

And if there is written evidence attending the deposit, the mortgagee will be entitled to the costs of his petition for a sale, but otherwise it seems not.

*Ex parte Brightens*, 1 Swanst. 3; *Ex parte Trew*, 3 Madd. 372; and *vide Anon.* 2 Madd. 281; *Ex parte Sikes*, 1 Buck. Ca. 349; *Ex parte Vauxhall Bridge Company*, 1 Glyn. & J. 101. As to priority of equitable mortgagees with respect to the crown, see *Hawkins v. Ramsbottom*, 1 Price, 138; *Broughton v. Attorney-General*, 1 Price, 216; *Casberd v. Ward*, 6 Price, 411; *Williams v. Medlicott*, 6 Price, 495.

The deposit and lien may be transferred by delivering over the deeds to another party.

*Ex parte Smith*, 1 Ves. & B. 518. As to an equitable mortgagee's remedies in case of bankruptcy of the mortgagor, see *Powell*, 1060 a, (6th edit.)

When title-deeds are left in the hands of an attorney for the purpose of preparing a mortgage, as a security for money previously advanced, this is an equitable mortgage by deposit of title-deeds.

*Keys v. Williams*, 3 Y. & Coll. 55. But see *Bozon v. Williams*, 3 Y. & Jer. 150.

A deposit of a lease by way of equitable mortgage does not render the depositary liable for the rents and covenants.

*Moore v. Choat*, 8 Sim. 508.

An endorsement on a ship at the time of the sale, that "the vessel should not be sold until the notes given for the purchase-money were paid," constitutes an equitable mortgage, especially when the ship's register was left with the vendor.

*Welsh v. Usher*, 2 Hill's Ch. 170.

On an equitable mortgage of leasehold premises with fixtures for the purpose of trade, held to be included, although not noticed in the memorandum; trade fixtures are important only in questions between landlord and tenant, and do not affect the consideration in questions between mortgagor and mortgagee.

*Broadwood*, *Ex parte*, 1 Mont. D. & G. 631.

But where the memorandum describe the deeds deposited as of "my B estate," held not to include the furniture in the house erected thereon.

*Hunt*, *Ex parte*, 1 Mont. D. & G. 139.

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Where the written memorandum did not state the purpose for which the deeds were deposited, it was the same as if a deposit had been made without any memorandum, and the party, therefore, merely entitled to the common order in such case.

Smith, *Ex parte*, 1 Mont. D. & G. 165.

An equitable mortgage may be created by the deposit of one title-deed, where the other deeds are in the hands of the depositor's solicitors, but not as equitable mortgages.

*Ex parte* Chippendale, 2 Mont. & Ayr. 299.

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgage, and the onus lies upon the former, claiming a priority, to prove that the latter had such notice.

*Ex parte* Hardy, 2 Deac. & Chit. 393.g

(B) What shall *be* or shall not *g* be deemed a Mortgage, or an Estate redeemable.

## § 1. What shall be deemed a Mortgage.g

HEREIN we may observe, in general, that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it appears to have been the intention of the parties, that such conveyance should only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so.

Vern. 183, 266, 394; Preced. Chan. 95; *g* Dey v. Dunham, 2 Johns. Ch. 189; S. C. 15 Johns. 555; Edrington v. Harper, 3 J. J. Marsh. 354; Senest v. Turner, 2 J. J. Marsh. 471; Oldham v. Halley, 2 J. J. Marsh. 114; Prince v. Bearden, 1 A. K. Marsh. 170; Skinner v. Miller, 5 Litt. 84; Reed v. Lansdale, Hard. 6; Van Buren v. Olmstead, 5 Paige, 9; James v. Johnson, 6 Johns. Ch. 417; S. C. 2 Cowen, 246; Clark v. Henry, 2 Cowen, 324; Elliott v. Pell, 1 Paige, 263; Hammonds v. Hopkins, 3 Yerg. 525; Hicks v. Hicks, 5 Gill. & Johns. 76; Brodgen v. Walker's Executors, 2 Har. & Johns. 285; Chambers v. Chambers, 4 Gill. & Johns. 420; Williams v. Piggott, Jac. R. 598; Anon. 2 Hayw. 26; Anon. 2 Desaus. 341; Crumbaugh v. Smock, 1 Blackf. 305; Rufford v. Bishop, 5 Russ. 346; Kellern v. Brown, 4 Mass. 443; Conway's Executors v. Alexander, 7 Cranch, 218; Henry v. Davis, 7 Johns. Ch. 40; Hughes v. Edwards, 9 Wheat. 489; Dabney v. Green, 4 Hen. & Munf. 101; Anderson v. Davies, 6 Munf. 484; Pratt v. Law, 9 Cranch, 456; Bishop v. Rutledge, 7 J. J. Marsh. 218; May v. Eastin, 2 Port. 414; Chambers v. Hise, 2 Dev. & Bat. Eq. 305; Crane v. Bonnell, 1 Green's Ch. 364; Wright v. Bates, 13 Verm. 341; Kent v. Allbritain, 4 How. (Ala.) R. 317; Roney v. Bell, 9 Dana, 3; Franklin v. Gorham, 2 Day, 142; Leonard v. Bosworth, 4 Conn. 421; Hayt v. Dimon, 5 Day, 479; Page v. Green, 6 Conn. 338; Newberry v. Bulkley, 5 Day, 384; Washburn v. Merris, 1 Day, 139; Wheeland v. Swartz, 1 Yeates, 579; Dimond v. Enoch, Addis. 257; Bell v. Fisher, 1 Yeates, 581, note; Wharf v. Howell, 5 Binn. 499; Irwin v. Tabb, 17 S. & R. 423; 3 Penns. R. 240; Ricket v. Madeira, 1 Rawle, 327; Friedley v. Hamilton, 17 S. & R. 70; Galbraith v. Fenton, 3 S. & R. 359; Stoeber v. Stoeber, 9 S. & R. 434; Colwell v. Woods, 3 Watts, 188; Kunkle v. Wolfersberger, 6 Watts, 126; Ker v. Gilmore, 6 Watts, 405; Rankin v. Mortemere, 7 Watts, 372; Gordon v. Preston, 1 Watts, 385; Stewart v. Stocker, 1 Watts, 140; Garber v. Henry, 3 Watts, 57; Heister v. Madeira, 3 Watts & Serg. 384; Williams v. Owen, 10 Sim. 386; Sevier v. Greenway, 19 Ves. 413.g

As, where the condition of a mortgage is, that the mortgagor shall redeem during his life, or that the mortgagor and the heirs of his body shall redeem, yet equity will admit the general heir of such mortgagor to a redemption; because this can be no purchase, since there is a clause of redemption; and when the land was originally only a pledge for money, if the principal and interest be offered, the land is free; and it would be very hard, that it



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should be in the power of the scrivener, or griping usurer, by such impertinent restrictions, to elude the justice of the court.

Vern. 33, 190; 2 Chan. Ca. 147, S. C.; Howard v. Harris; [Spurgeon v. Collier, 1 Eden, 55.]

If A mortgage lands to B worth 15*l.* *per annum*, for securing 200*l.*, and at the same time B enter into a bond, conditioned that if the 200*l.* and interest is not paid within a year, then he to pay to A, his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises, &c., and A die within the year, and the 200*l.* with interest not being paid at the day, the heir of B pay the 78*l.* the next day after the mortgage is forfeited to the administrator of A, yet A's heir may redeem, paying the 200*l.* and likewise the 78*l.* that was paid the administrator.

Vern. 488, Willet v. Winnel.

So, where A for 550*l.* made an absolute assignment of a church lease for three lives to B, and B by writing under his hand agreed, that if A paid 600*l.* at the end of the year, B would re-convey; B died, leaving C his son and heir; two of the lives died, and the lease was twice renewed by C and his father: though it was nearly twenty years since the conveyance was made, yet the Master of the Rolls decreed a redemption on payment of the 550*l.* and the two fines.

2 Vern. 84, Manlove v. Ball. [Vide Sevier v. Greenway, 19 Ves. 415.]

{ A bond conditioned to re-convey an estate upon payment of a 'sum of money, which estate was conveyed by the obligee to the obligor by deed of the same date, and the condition recites that the conveyance was made as a security for money due, is a defeasance of the deed, and makes it a mortgage.

2 Mass. T. Rep. 493, Erskine v. Townsend; 4 Johns. Rep. 186, Jackson v. Green, *acc.*

Z purchased from B a farm for 450*l.*, of which he paid 100*l.*, and executed a bond and mortgage for the residue. B afterwards obtained judgment on the bond, and issued a *fi. fa.* which was levied on the farm; but a sale did not then take place, because Z, in order to obtain a longer time for payment, assigned to B, as an additional security for the money due to him, class-rights for 1400 acres of land, with a power to take out letters-patent in his own name; B at the same time executing to Z a bond for 300*l.* conditioned that if Z, his heirs, &c., should pay to B, his heirs, &c., 250*l.* within one year, the assignment of the class-rights should be void. This assignment was held to partake of the quality of the original transaction, and was deemed a mortgage and not a defeasible purchase. And B having obtained letters-patent in his own name, and, after the day for payment had passed, conveyed the lands to a *bond fide* purchaser without notice, it was held that though the purchase could not be impeached, Z was entitled to an account; and that the sum at which the land was sold, with interest, was the amount for which he was entitled to a credit, though he did not demand a redemption for more than six years after the day of payment.

2 Cain. Er. 124, Bloodgood v. Zeily.}

A lends money to B to carry on certain buildings, and takes a mortgage from him to secure 1600*l.* with interest; and, by another deed executed at the same time, takes a covenant from B that he should convey to him, if he thought fit, ground rents to the value of 1600*l.* at the rate of twenty years' purchase; and, on a bill brought to redeem, the Master of the Rolls decreed

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a redemption on payment of principal, interest, and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.

2 Vern. 520, *Jennings v. Ward*.

[Again, where the plaintiff being seised in fee of the lands in question, worth 200*l. per annum*, mortgaged the same in 1637 to the defendant's father for 250*l.*, and agreed and also sealed a deed for the absolute sale thereof, if the money were not paid at the end of seven years; a redemption was decreed, notwithstanding; for the defendant's father, having exhibited a bill against the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being so at first, the subsequent agreement could not alter it.

*Bowen v. Edwards*, 1 Rep. Ch. 222; 13 Car. 2.

And although a mortgagee have a power to mortgage or to sell the lands mortgaged absolutely, in case of failure of payment at a given time, a court of equity will, nevertheless, consider any conveyance by him to be subject to redemption, if it be evident from the *res gestæ* that the vendee did not depend upon the power; as, if the equity of redemption be excepted in the conveyances. Thus, a conveyance of lands was made, by lease and release, by A to B and his heirs, and by a defeasance, bearing date with the release, it was agreed that if A repaid 1000*l.*, &c., borrowed of B within a year from the date of the indenture, then B should re-convey to him; but if he failed to pay the money within the year, then B should mortgage or absolutely sell the lands, free from redemption, and out of the money raised by such mortgage or sale pay the said 1000*l.*, &c., and interest, and be accountable for the overplus to A and his heirs. A fine was also levied to B in order to bar A's wife of dower. Afterwards, the money not being paid at the time stipulated, B agreed to convey the estate for a certain sum of money, and in the agreement, and also in the conveyances, an exception was made, and in such exception the defeasance was mentioned. And afterwards a question arose, Whether the purchaser had an absolute estate, or an estate redeemable? And it was contended that he had an absolute estate, for that the estate conveyed to B was an absolute estate, and though there was a defeasance executed at the same time, yet that was to have operation only within a twelvemonth, after which period B was invested with a power to sell absolutely, free from all equity of redemption; consequently, it then became a trust for B to sell, and where an estate was conveyed to trustees to sell, the vendee, by virtue of such sale, had an absolute fee, free from all charges and power of redemption. And the fine, it was said, passed the right of the then owners in the estate, and made it absolute. But it was answered, and resolved by the court, that the estate was redeemable, for the estate conveyed by A to B was, in its nature, a mortgage to him, and though the money was not paid within the year, yet the mortgagor might still have redeemed at any time while the estate continued in B; and then, though B had a power, on non-payment within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he *had* done; and it was evident, that it was not B's intention to convey an absolute and indefeasible estate, for he had not conveyed it absolutely, and free from the equity of redemption; but had insisted upon having the

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defeasance inserted. If then, as was the case, B, on non-payment of the money within a year, stood as a trustee for A, subject to the defeasance, his (B's) vendee coming in with notice of that trust would stand in his place, and must be considered as taking the conveyance liable, in equity, to the performance of the trust; and the fine made no difference, for it only operated to strengthen the estate and free it from the dower of the wife, but it confirmed it *in statu quo*, and did not discharge it from the equity of redemption to which it was before liable.

Croft v. Powell, Comyns, 603.

{ A sale under a power to sell on default of payment contained in a mortgage-deed is a species of foreclosure, and under it a mortgagee may himself make a *bond fide* purchase. And after a lapse of sixteen years from the time of such sale, known to the mortgagor or his heir, who during that period has remained passive, a redemption will not be allowed.

1 Cain. Er. 1, Bergen v. Bennett. }

It seems questionable whether a power of redemption can be set up upon a subsequent agreement, made after an absolute conveyance executed; for if it be a mortgage, it must be so *ab initio* on the original agreement. And, therefore, where one having the reversion expectant upon the determination of a lease for life, in an estate worth 1000*l.* *per annum*, conveyed it in fee to W R, in consideration of 1000*l.* and no more, and the tenant for life died, a pretence was set up that this conveyance was no more than a mortgage, because W R had declared *that he did not* know how long he should enjoy the estate, and that he would take his money again with interest: *sed dubitatur per curiam*; and one reason was, because matter subsequent will not make it a mortgage, if it was not so upon the original agreement.

Vide Coplestone v. Boxwill, 1 Chan. Ca. 1; 3 Salk. 241. ¶ In determining between an absolute sale and a mortgage, the court will take the intention of the parties, from a view of all the circumstances; and when an absolute sale was intended as a pledge, the court will relieve against the sale and suffer a redemption. May v. Eastin, 2 Porter, 414. And if the defeasance be made at a subsequent day, it will relate back to the date of the deed. Crane v. Bonnell, 1 Green's Ch. 264. See Wright v. Bates, 13 Verm. 341.*g*

But although courts of equity will not suffer the mortgagee to clog the redemption with any stipulation for a purchase, at a specific price agreed upon at the time of the loan, because the admission of such a practice would furnish an inlet to great fraud and imposition upon the mortgagor: yet, a mere agreement that, in case of sale, an opportunity of pre-emption should be given to the mortgagee, would, it seems, be decreed; but it must be claimed at a reasonable time: for, where A, the plaintiff's brother, died, having previously mortgaged lands to B, by deed, containing covenants to re-convey upon six months' notice of payment of the principal and interest, and that in case the estate should be sold, B should have the pre-emption; B got the counterpart into his hands after A's death; then the plaintiff gave him six months' notice that he would pay off the mortgage, which he refused to accept; upon which the plaintiff exhibited his bill for a re-conveyance of the estate, having entered into articles for the sale of it; B in his answer insisted on the covenant for pre-emption; but it appearing that neither the plaintiff nor purchaser knew any thing of this covenant, the counterpart of the deed having been in B's custody; that the plaintiff, on application for it, had been denied it, the mortgagee insisting only on payment, alleging the security was too narrow for the money lent, and threatening to foreclose,

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never having mentioned his claim to pre-emption until after the estate was sold. I was said, he ought not to set it up to the prejudice of the purchaser, having had time to claim it, if he had pleased, before the estate was sold; and I was decreed accordingly.

*Ony v. Trigg, 2 Eq. Ca. Abr. 599, 24; S. C. 9 Mod. Ca. in Law and Eq. 2.*

A distinction hath been made by the Court of Chancery between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event, and cases where, after a mortgage, a new agreement hath been entered into and executed by the parties for an absolute purchase, although there be a subsequent declaration that the mortgagor may have his estate upon payment of interest, principal, and costs; or, where a release of the equity of redemption is given with a collateral agreement to reconvey, upon re-payment of the purchase-money; and, in the latter cases, it hath been determined that no re-purchase shall be had, unless upon strict performance of the conditions stipulated. Thus, A, a joint-tenant with B, her mother, made an absolute conveyance to C in fee for 104*l.*, which was admitted to be intended only as a mortgage; some time after, in 1708, those deeds were cancelled, and then A, in consideration of 184*l.*, (including the 104*l.* paid by C,) conveyed the estate *ut supra*, but with a farther covenant not to assent to any partition without C's consent. B was in possession till 1710, when C ejecting her out of her moiety, enjoyed it quietly till 1726, at which time A brought a bill for redemption, to which C pleaded himself an absolute purchaser. The receipts given for the money mentioned it to be purchase-money. In 1710, there was an agreement that A might have the estate again, if desired, on payment of principal, interest, and charges. It was first heard before the Master of the Rolls, who dismissed the bill. Afterwards it came on before Lord Chancellor Talbot, who observed the case was very dark; the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed to be an actual conveyance, so that it was of no great weight, and ought to be laid out of the question; that he was inclined, upon the whole, to think the conveyance in 1708 was at first an absolute conveyance. The agreement, in 1710, for the re-purchase, showed it was not redeemable at first; the acquiescence of sixteen years, upon C's possession, was a strong evidence of it; and his lordship, upon the circumstances of the case, affirmed his honour's decree.

*Harrell v. Nabham, 1 Vern. 408; Cottrell v. Purchase, Ca. temp. Talb. 61.*

So, lands in Wales were mortgaged for 400*l.*, and afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more; a note was given at the time of executing the release, that the releasee, on payment of the 750*l.* and all charges of repairs within a year by the releasor, should sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an implied agreement between the parties to sell and convey the premises

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upon the terms therein mentioned, but not that the releasor should be at liberty to redeem the same.

Endsworth v. Griffith, 15 Vin. Abr. 467, pl. 18; 2 Eq. Ca. Abr. 595, pl. 6, 1 Brown's Parl. Ca. 149.]

¶But even where the equity of redemption is actually released to the mortgagee, the court will admit evidence that the release was made on a secret trust for the mortgagor's benefit, or that it was not intended to be an absolute sale. Vernon, a planter, being indebted to Bethel, his consignee, to a large amount on the mortgage of an Antigua estate, the former, in 1738, executed an absolute release to the latter of the equity of redemption, in consideration of five guineas, and Bethel remained in possession and receipt of the rents and profits. More than twenty years afterwards Vernon filed a bill for an account and redemption; and it appearing that Bethel had repeatedly admitted, by letter and by parol, to Vernon and other parties, that he was bound in honour and conscience, and by a voluntary promise, to restore the estate on payment of his debt, and that he stated his original application to be let into possession to be made partly in order "to save something for Vernon's family," the lord chancellor decreed an account and redemption.

Morley v. Elways, 1 Chan. Ca. 107; Vernon v. Bethel, 2 Eden, 110.]

But if a man borrows money of his brother, and agrees to make him a mortgage, and that if he has no issue male his brother shall have the land; such an agreement, made out by proof, will be decreed in equity.

Vern. 193, *per* North, L. K.

A, in consideration of 1000*l.*, made an absolute conveyance to B of the reversion of certain lands after two lives, which, at that time, were worth little more; and by another deed, of the same date, the lands were made redeemable any time during the life of the grantor only, on payment of 1000*l.* and interest; A died, not having paid the money; and it was held by my Lord Nottingham, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage and always a mortgage*, and that B might have compelled A to redeem in his lifetime, or have foreclosed him. But, on a re-hearing, Lord Keeper North reversed the decree on the circumstances of this case; for it appeared by proof, that A had a kindness for B, and that he had married his kinswoman, which made it in the nature of a marriage-settlement: he likewise held, that B could not have compelled A to redeem during his life, which made it the more strong.

Vern. 7, 214, 232, Newcomb v. Bonham; 2 Vent. 364, S. C., where it is said, that Lord North's decree was affirmed in the House of Lords. *β* A deed of land and a bond to the grantee to convey it to the grantor, bearing different dates, but executed and delivered at the same time, constitute a mortgage. Newhall v. Burt, 7 Pick. 157.*g*

[Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a sum certain, within a stipulated time, in contemplation of a settlement or family provision. Thus, A, seized of a copyhold in fee, surrendered it, upon his marriage, to the use of himself and his wife in special tail, remainder to her in fee, upon condition that if he paid 50*l.* at a day certain to the daughter that the wife had, then the whole surrender would be void. The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem, brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration without notice; and it was resolved, that this was not originally designed for a mortgage, but that the

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party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand; he had chosen the latter, and the plea was allowed.

King v. Bromley, 2 Eq. Ca. Abr. 595, 598.

One, upon his marriage, covenanted that his wife should be paid 1000*l.* within two years after his death, and, for performance thereof, entered into a statute; but, prior to the covenant and statute, he had mortgaged part of the lands for 500*l.* for certain years. Afterwards he devised these lands to his wife and his heirs, if the 1000*l.* were not paid to her, according to the marriage-covenant, she paying off the said 500*l.* He died, leaving his wife executrix, to whose hands assets came; the 1000*l.* not being paid to the wife, she paid off the 500*l.* and had the mortgage-lands assigned to her. She then conveyed over the mortgage-lands in fee by fine and deed. The question was, Whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with interest upon discount of the profits? And the Lord Chief Baron was of opinion he could not; for the devise to the wife was absolute, if the 1000*l.* were not paid at the time appointed.

Sir Nich. Woolston v. Aston, Hardr. 511.

A distinction hath been likewise taken between mortgages and defeasible purchases, subject to re-purchases within a *time limited*, where the interest is taken by way of rent-charge; for, in the latter cases, the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute. Thus I S granted a rent-charge in fee of 48*l.* a year to B, upon condition, that if I S should, at any time, give notice to pay in the consideration-money (being 800*l.*) by instalments, viz.: 100*l.* at the end of every six months; and should, pursuant to such notice, pay the same and interest *at any time during his lifetime*, then the grant to be void. There was no covenant for I S to pay the money, and the rent-charge was much less than what the interest came to (interest being then 8 *per cent.*); B had conveyed it over after I S's death to a *purchaser, with collateral security* for quiet enjoyment, and the *purchaser* had afterwards made a marriage settlement upon it. The question was, Whether it was redeemable after sixty years? And it was decreed, by Lord Cooper, that it was not. His lordship observed, it was material that at the time of making the mortgage, interest was at 8 *per cent.*, the rent-charge, therefore, was much less than the interest of the money; consequently, the payment of the rent-charge could not be taken as the payment of the interest; that several circumstances occurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that *the mortgagee seemed to have allowed a consideration* for purchasing the equity of redemption after the death of the mortgagor; first, by taking the rent of 48*l. per annum*; secondly, by agreeing to have his money by instalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased; that length of time, where so great as in the present case, was a good bar of redemption of a rent-charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant.

Floyer v. Levington, 1 P. Wms. 268.

The reporter observes upon the last case, that it was thought length of

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time was the principal objection to the redemption ; but in the case of *Mellor v. Lees*,<sup>(a)</sup> which came on before Lord Chancellor Hardwicke, upon an appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather re-purchase, were legal, was confirmed. In this case a mortgage was made of an estate by the plaintiff's grandfather, Thomas Mellor, in 1689, to John and James Whitehead ; the Whiteheads afterwards, on the 5th of June, 1689, mortgaged the same estate to Cartwright and Haywood, and their heirs, for securing 200*l.*, to which Thomas and his son, John Mellor, were parties ; and Cartwright and Haywood, in order to secure themselves the interest, made a lease to the plaintiff's father, and to his assigns, dated the 12th of June, 1689, for five thousand years, at the rate of 12*l.* a year for the three first years, and 10*l.* a year for the remainder of the term ; and if, in the space of three years, the 200*l.* was paid with interest, then the premises were to be re-conveyed. Receipts had been given sometimes for interest, and sometimes for a rent-charge ; the last receipt was in 1730. The 200*l.* lent was money left under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee, in Lancashire or Cheshire ; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate, at the time of the mortgage, was worth 500*l.* only, but was now valued at 900*l.* The plaintiff, on the 20th of January, 1738, had given notice that he would pay in the money ; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. And it was so decreed by Fortescue, Master of the Rolls, which decree was upon appeal to the chancellor confirmed, his lordship saying, that the bill was properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to the case of *Floyer v. Levington*.

## (a) 2 Atk. 494.

It seems, from the determination in the case of *Tasburgh and M'Namara v. Sir Robert Echlin et al.*, that such a contract respecting lands, limiting the payment of the money advanced and interest thereupon to a particular period, would be considered in the nature of a conditional purchase, and no redemption allowed thereof after the time stipulated.

*Tasburgh v. Echlin et al.*, 4 Brown's Parl. Ca. 142. [See *Verner v. Winstanley*, 2 Scho. & Lef. 393 ; *Gifford v. Hort*, 1 Scho. & Lef. 107 ; *Butler*, Co. Lit. 205 a, note, s. 2 ; *Sugden's V. & P.* 223, (5th ed.) Mr. Coote, p. 30, thinks the principal case was determined on circumstances too special to be considered an authority for the general rule deduced from it in the text ; *sed vide Powell*, 133 a, (6th ed.)]

This case came before the House of Lords upon an appeal from a decree made by the Lord Chancellor of Ireland, in the year 1732, on the following circumstances, viz. : King James I., by his letters-patent under the great seal, dated the 17th of June, 1608, granted divers lands to John King and John Bingley, and their assigns, for 116 years, to commence from the 18th of May then last past, at a certain yearly rent. The residue of this term, by deed dated the 26th of May, 1677, became vested in John Tasburgh, father of Henry Tasburgh, the appellant in the cause. King Charles I., by his letters-patent, dated the 25th of March, 1647, granted the same premises to Sir Maurice Eustace and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years. Sir Maurice, by his will dated the 20th of June, 1665, devised the premises, *inter alia*, to his nephew Sir John Eustace in fee ; who by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant

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on the determination of the term of 116 years. The premises being only of the clear yearly value of 200*l.* Sir John, in consideration of 200*l.* paid him by the said John Tasburgh, did by lease and release, dated the 30th and 31st of May, 1681, grant and convey the same to Charles Tasburgh and his heirs, in trust for John Tasburgh; in which indenture of release there was a proviso to the following effect, viz.: that if Sir John Eustace, his heirs, executors, or administrators, should pay to Charles Tasburgh, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the release, the sum of 200*l.* with full interest for the same, at the rate of 10*l. per cent. per annum*, according to the custom of the kingdom of Ireland, that then it should be lawful for him and his heirs into the premises to re-enter, and the same to repossess and enjoy as in his and their former right. But if Sir John, his heirs, executors, or administrators, should fail in payment of the money with interest at the time limited, that then the estate of the said Charles Tasburgh should be absolute and indefeasible, as well in equity as in law; and that Sir John, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release. And Sir John did thereby, for himself and his heirs, release unto Charles Tasburgh, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid; and there was no covenant in the deed, on the part of the grantor, to repay the 200*l.*, or the interest thereof, as is usual in mortgages. The five years mentioned in the proviso being elapsed, and no part of the 200*l.*, or the interest thereof, having been paid, John Tasburgh (having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term of which there were then forty-three years unexpired) exhibited a bill, in April, 1687, in the name of Charles Tasburgh, against Sir John Eustace, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of Charles Tasburgh in the premises (in case it should be adjudged to be a defeasible or redeemable estate) should be made absolute to him and his heirs; and that in that case Sir John Eustace might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said Charles Tasburgh, according to the tenor and true meaning of the indentures of lease and release. Sir John, being served with a *subpœna* to answer this bill, stood out all process of contempt to a sequestration, and, in May, 1688, appeared by his six clerk, and prayed a commission for taking his answer in England, which was granted by consent. But it was ordered, that, unless the same was returned by the 22d of June following, the cause should be set down to be heard, and the bill taken *pro confesso*. Sir John having neglected to answer at the time limited, farther time was given him; but he still neglecting to answer, a decree was made the 11th December, 1688, that he should be foreclosed, unless the principal, interest, and costs were paid before the 11th December, 1689. Afterwards Sir John Eustace returned to Ireland, and lived until the year 1706, when he died without issue; but he never took any one step to impeach these proceedings or decree; nor did he ever attempt to seek a redemption of the premises, but acquiesced under the decree for eighteen years. Henry Tasburgh, the appellant, succeeded to his estate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquiescence of thirty-four years under the decree, any person would set up a claim thereto under Sir John Eustace, he by in-



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denture, dated the 24th of April, 1722, in consideration of a fine of 300*l.*, demised the same to the appellant George M'Namara for the term of thirty-one years, at the clear yearly rent of 250*l.* But the value of lands in Ireland rising considerably, a bill was exhibited in the Court of Chancery there, in September, 1723, by several persons in right of their wives, (nieces and co-heiresses of Sir John Eustace,) alleging, that the decree of foreclosure was obtained by surprise, fraud, and imposition; and praying it might be reversed. Afterwards, in April, 1729, the appellant Henry put in a plea and answer to this bill, (which having abated, they claimed a right to revive,) insisting on the title as before set forth; and farther pleading the lease and release executed in 1681 by Sir John Eustace, the declaration of trust executed by Charles Tasburgh, the decree of foreclosure, and the proceedings had in that cause, and the great length of time and acquiescence under that decree. And George M'Namara denied notice of the respondents' title, and insisted that he was a purchaser, for a valuable consideration, of his said term without any notice. But it was decreed, that upon the respondents paying the appellant Henry the principal, interests, and costs due to him, he should re-convey the same; and as to M'Namara, an issue was directed to be tried, whether he, at any time, and when, had notice that the co-heiresses of Sir John Eustace had or claimed any and what right to the lands in question, after the lease to King and Bingley should expire? From this decree an appeal was brought, when it was ordered and adjudged, that the proceedings, orders, and decrees complained of by the appellant should be reversed, and the respondents' bill dismissed.]

|| CONDITIONS FOR ABATING AND RAISING INTEREST. ||—But though these and suchlike restrictions are relieved against, to make them answer the primary intention of the parties, yet, if A on a mortgage lends money at 5*l. per cent.*, but agrees in the deed, that, if the money be paid within three months after it become due, he will accept of 4*l. per cent.*, and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5*l. per cent.*; for though the court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5*l. per cent.*

Preced. Chan. 160, Jory v. Cox. {See 7 Ves. J. 273.}

|| But although the condition on which the interest is to be abated must be strictly performed on the part of the mortgagor, yet the agreement for abatement is not considered so strictly in the light of a condition as to be utterly defeated by a single breach. Sir William Stanhope borrowed 10,000*l.* of Lord William Manners, on redeemable mortgage, with interest at 5*l. per cent.* The mortgage contained a proviso, that so often as the interest should be paid, half-yearly, or within three calendar months after each half-yearly day, 3*l.* 15*s. per cent.* should be accepted by Lord W M in lieu of 5*l. per cent.* And, by a separate agreement of the same date, it was agreed that Lord W M should not call for the money unless the interest should be in arrear. The first half-year's payment was not tendered till after the expiration of three months from the half-yearly day; on which Lord W M wrote a letter, stating the omission, and insisting on the failure, and soon afterwards gave notice to be paid off the principal. Within the three months from the second half-yearly day, Sir W S tendered one half-year's interest at 5*per cent.*, and another half-year's interest at 3½*per cent.*, which was refused; and the present bill was filed for specific performance

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of the agreement to take  $3\frac{1}{2}$  *per cent.* Lord Northington C. held, 1st, That the mortgagee was bound to accept  $3\frac{1}{2}$  *per cent.* for the second half-year, notwithstanding the first default; and, 2d, That he was at liberty to call in his money.

Stanhope v. Manners, 2 Eden, R. 197. See Leveridge v. Forty, 1 Maul. & S. 706; Powell, 901 a, note M.]

So, if the mortgagee devises, that the mortgagor should be remitted part of his mortgage-money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost: because this being a voluntary bounty, and not *ex debito justitiæ*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case after the day.

Chan. Rep. 52.

But where in a mortgage there was a proviso, that, if the interest was behind six months, then the interest should be accounted principal, and carry interest; this, by my Lord Cowper, was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far; and that an agreement made at the time of the mortgage, will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal.

2 Salk. 449, pl. 1; Lord Ossulston v. Lord Yarmouth, 2 Atk. 331; Thornhill v. Evans, S. P.; Chambers v. Goldwin, 9 Vesey, 271, S. P. Per Lord Eldon, C. But such an agreement is not usurious at law. Legrange v. Hamilton, 4 Term R. 613; 2 H. Bl. 144; and see 1 Ball & B. 430.]

[But where, on a bill to foreclose a mortgage, the interest, by the deed, was to be 5 *per cent. per ann.*, payable half-yearly, and if not paid by the space of two months after the time of payment, then to be raised to 5*l.* 10*s.* *per cent. per ann.* for increase of interest; the interest being run greatly in arrear, the question was, After what rate it should be computed on redemption of the mortgage? And it was decreed to be computed at the rate of 5 *per cent. per ann. only*: for where the interest was to be increased, if not paid at the day, that was but in the nature of a penalty, and relievable in equity.

Strode v. Parker, 2 Vern. 316; Holles v. Wyse, 2 Vern. 289; Nichols v. Maynard, 3 Atk. 520; Seton v. Slade, 7 Ves. 273.]

But it seems, that if there be a covenant for payment of the additional 1 *per cent.*, the court will not relieve against it. Thus, where money was lent on mortgage at 5 *per cent.*, and the mortgagor covenanted to pay 6 *per cent.* if he made default in payment of interest for the space of sixty days after the time of payment; the court decreed, that, from default made, the mortgagor should pay 6 *per cent.*, for that this covenant was the agreement of the parties, and not to be relieved against as a penalty.

Marquis of Halifax v. Higgins, 2 Vern. 134. [But this case seems to be overruled. See 2 Eden, R. 199, note; Prec. Chan. 161.]

And, if an indulgence be given by the mortgagee, such agreement will be good to raise the interest, upon the ground of forbearance; such additional interest not being considered, in that case, as a penalty, but as a liquidated satisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in Ireland, to trustees, by way of securing debts to creditors, and no money actually passed, but the sum nominally lent was to be paid by instalments; an agreement that the interest of those sums should rise, on

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non-payment at the time appointed, or within three weeks after, from 5 to 8 per cent., was held good, upon an appeal to the House of Lords.

Burton v. Slattery, 3 Brown's Parl. Ca. 68.

And, in a similar case, where a long arrear of interest had accrued, and the mortgagee had sent an account thereof to the mortgagor, who returned an answer, admitting the account, *desiring forbearance*, and promising to make satisfaction for the same; Lord Chancellor Parker allowed the additional 1 per cent., reserved, as a satisfaction; saying, that though the proviso, obliging the party to pay 6 per cent. was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved against, if only a very short lapse had happened; yet it might not be relievable against, in case of a long arrear of interest; and that if no reservation of 6 per cent. had been made, and a great arrear of interest had incurred, the court, on such a promise in writing to make a satisfaction for forbearance, would have given the mortgagee some allowance in that respect.

Brown v. Barkham, 1 P. Wms. 652.] ||In 2 Eden, R. 199, note, this case is said to be overruled, *sed qu.* ? Vide, as to interest, *post*, Mortgage (F.)||

β Whenever a transaction resolves itself into a security, it is a mortgage.

Flagg v. Mann, 2 Sumn. 490. See Dougherty v. M<sup>c</sup>Colgan, 6 Gill & Johns. 275; Thorpe v. Ricks, 1 Dev. & Bat. Eq. 613; Wright v. Bates, 13 Verm. 341; Williams v. Owen, 10 Sim. 386; M<sup>c</sup>Donald v. M<sup>c</sup>Leod, 1 Ired. Eq. 221; Lewis v. Owen, 1 Ired. Eq. 291; Weed v. Stevenson, 1 Clarke, 166; Hicks v. Hicks, 5 Gill & Johns. 76; 2 Har. & Johns. 285; Menude v. Poloney's executor, 2 Desaus. 341; Delaire's executor v. Keenan, 2 Desaus. 74; Erskine v. Townsend, 2 Mass. 493; Taylor v. Weld, 5 Mass. 109; Carey v. Rawson, 8 Mass. 159; Harrison v. Phillips' Academy, 12 Mass. 456; Scott v. M<sup>c</sup>Farland, 13 Mass. 309; Eaton v. Whiting, 3 Pick. 484; Stocking v. Fairchild, 5 Pick. 181; Lanfair v. Lanfair, 18 Pick. 299; Nugent v. Riley, 1 Metc. 117; Rice v. Rice, 4 Pick. 349; Parks v. Hall, 2 Pick. 206; Fowler v. Rice, 17 Pick. 100.

In order to constitute a mortgage, it is not requisite that the condition should be inserted in the body of the deed; it may be written underneath the deed, (a) or by parol, especially if the grantor continues in possession. (b)

(a) Kent v. Allbritain, 4 How. (Ala.) R. 317. (b) Wright v. Bates, 13 Verm. 341; Anon. 2 Hayw. 26. See 1 Johns. Ch. 594; 1 Paige, 202; 1 Day, 133.

When the transaction is intended to be a mortgage, the time fixed for redemption is immaterial: once a mortgage always a mortgage, is the rule.

Crane v. Bonnell, 1 Green's Ch. 264.

A mortgage defectively executed may be enforced in equity.

Lake v. Doud, 10 Ohio, 415.

A mortgage to secure as well future as present advances is valid, but it must express its object; and future advances will not be embraced by the mortgage under a subsequent parol agreement.

Walker v. Snediker, 1 Hoff. 145; Williams v. Piggott, Jac. R. 598.

A mortgage obtained by the misrepresentation of the mortgagee is void.

Joice v. Taylor, 6 Gill & Johns. 54.

A mortgage of his commission, by an officer in the army, is void.

Collyer v. Fallon, Turn. & Russ. 459.

A lease for years by indenture, in which the lessor acknowledges the receipt in advance of a gross sum in full, for the rent of the demised premises during the term, in which the lessee covenants to reconvey the premises, on payment of said sum and interest thereon, is a mortgage.

Nugent v. Riley, 1 Metc. 117.

## (B) What shall be deemed a redeemable Mortgage.

When a deed, absolute in its terms, was duly executed, and on it was endorsed a writing in the form of a condition to a mortgage, without date, seal, or signature, it was held that the deed was a mortgage.

*Stocking v. Fairchild*, 5 Pick. 181.

Land was conveyed in fee, and the grantee, at the same time, by indenture, "demised, granted, and to farm let," the premises to the grantor, "for the purpose of securing to the grantor his maintenance during his life;" held, that the indenture was a mortgage.

*Lanfair v. Lanfair*, 18 Pick. 299.

In order to create a mortgage by an absolute deed and a deed of defeasance, it is not requisite that the two instruments should bear date at the same time; when they are delivered at the same time, it is sufficient.

*Harrison v. Phillips' Academy*, 12 Mass. 456; *Newhall v. Burt*, 7 Pick. 157. See *Lovering v. Fogg*, 18 Pick. 540.

At law, a writing under seal cannot operate as a defeasance of deed of conveyance of land; (a) but is otherwise in equity. (b)

(a) *Killeran v. Brown*, 4 Mass. 443; *Flint v. Sheldon*, 13 Mass. 443; *Cutler v. Dickinson*, 8 Pick. 386; *Flagg v. Mann*, 14 Pick. 467; *Scituate v. Hanover*, 16 Pick. 222. (b) 4 Mass. 443; 8 Pick. 386; 14 Pick. 467; 22 Pick. 526; and see *Harrison v. Phillips' Academy*, 12 Mass. 456.

An absolute deed of land, and a bond made at the same time, to reconvey upon the payment of a sum of money, though unaccompanied by any collateral personal security for such payment, constitute a mortgage.

*Rice v. Rice*, 4 Pick. 349. See 12 Mass. 387; 13 Mass. 443; 13 Pick. 411; 14 Pick. 467. See *vide Reading v. Weston*, 7 Conn. 143.

But the sale and conveyance of real estate, in payment of a pre-existing debt, with a simple right to re-purchase on the part of the debtor, is valid, and is not a mortgage, even in equity.

*Baxter v. Willey*, 9 Vermont, 276.

When a mortgage is given as security for the payment of promissory notes, which are from time to time renewed, the renewal is not to be deemed an extinguishment of the original debt, so as to affect the continuance of the security.

*Dunham v. Dey*, 15 Johns. 555. See *Wilkinson v. Simson*, 2 Moore, 275; *Heard v. Isham*, 2 Freem. Miss. R. 79; 7 Vern. 493. See *Extinguishment*, D.

But the notes to be secured must be described in the mortgage, (c) and produced on the trial. (d)

(c) *Hart v. Chalker*, 14 Day, 77. But see *Crane v. Deming*, 7 Conn. 387; *Godard v. Seldon*, 7 Conn. 515. (d) *Edgell v. Stamford*, 3 Vern. 202

Although such note may be barred by the act of limitations, the mortgage will not be barred in less than twenty years.

*Lingan v. Henderson*, 1 Bland, 282. See 17 Pick. 386.

A seller of a thing taking a mortgage on the thing sold, to secure the purchase-money, can claim only under the mortgage, and according to its terms. The mortgage supersedes the implied equitable lien for the purchase-money; which but for the mortgage would have attached to the thing sold.

*Little v. Brown*, 2 Leigh, 353.

A mortgage is merely a lien, by means of which the mortgagee may obtain possession, and, if his debt is not paid, appropriate the thing pledged in satisfaction.

*Franklin v. Gorham*, 4 Conn. 431.

(B) What shall be deemed a redeemable Mortgage.

To render a mortgage valid as against strangers, it must give reasonable notice of the encumbrance on the land mortgaged.

*Stoughton v. Pasco*, 5 Conn. 442; *Shepard v. Shepard*, 6 Conn. 37; *Booth v. Barnum*, 9 Conn. 286.

Where the president of an incorporated company affixed the corporate seal to a mortgage, and signed his name to the same as president, and acknowledged the execution thereof before the proper officer, testifying that the seal thus affixed was the common seal of the corporation, and was affixed by him by authority of the corporation. Held, that the mortgage was duly acknowledged and proved to entitle it to be recorded, or to be read in evidence without further proof of its execution.

*Lovett v. Steam Saw Mill Association*, 6 Paige, 54.

A conveyance may be considered as a mortgage, though the defeasance be on a separate paper.

*Friedley v. Hamilton*, 17 S. & R. 70; *Dimond v. Enoch*. Addis. 357; *Colwell v. Woods*, 3 Watts, 188.

A conveyance, absolute on its face, may be shown to be a mortgage by extrinsic proof.

*Kunkle v. Wolfersberger*, 6 Watts, 126. See *Kerr v. Gilmore*, 6 Watts, 405.

At a sheriff's sale of land, the plaintiff agreed with the defendant in the execution that the property should be struck down and conveyed to the plaintiff; and that he should reconvey it to the defendant upon the payment of the amount due upon the execution within a specified time, and that upon failure to pay within that time the title should be absolute. Held, that this arrangement created a title in the plaintiff in the nature of a mortgage.

*Heister v. Madeira*, 3 Watts, 384.

A deed was made for land. An agreement of the same date accompanied the deed. It recited that the parties to it were parties to the deed, that it was made for a certain sum due from the grantor to the grantee, or for securing the payment of the money, and stipulated that the grantee would not sell nor mortgage the property for three years and three months, and that he would then deliver up the deed to the grantor if the money should be repaid by instalments within that time; and it provided that if either party should die, or the premises should be sold within that time, and more than the sum due and the interest should be obtained, the surplus should go to the grantor, but if less, the grantor should supply the deficiency, is a mortgage.

*Stoever v. Stoever*, 9 S. & R. 434.

A deed conveying land contained a clause that if the grantor should refund to the grantee the consideration-money, with interest thereon, in one year from the date, that the deed should then be void; and it contained also the following words, namely: "and this is not to be considered in the nature of a mortgage, but an express stipulation to pay on the particular day, and if not then paid the estate and title shall be absolute without any further deed, transfer, or proceedings whatever." Held that this was nevertheless to be considered a mortgage.

*Rankin v. Mortimore*, 7 Watts, 372.

A mortgage may be taken or held for future advances and responsibilities.

*Garber v. Henry*, 3 Watts, 57. See *Irwin v. Tabb*, 17 S. & R. 423; *Gordon v. Preston*, 1 Watts, 385.

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E

## (C) Interests of the Mortgagor and Mortgagee.

But it must appear on the face of the mortgage for what it is a security.

Hart v. Chalker, 14 Day, 77.

A, having become the purchaser of an estate by auction, first borrows of B the money required for payment of the duty and the deposit, then a sum of 1000*l.*, and then enters into an agreement with B that in consideration of the above sums the whole of the purchase should be conveyed to him, provided that if A should by a certain day repay to B the 1000*l.*, and the whole purchase-money of the estate (which B would then have paid) with interest, the agreement should be void, otherwise the sale should be confirmed: held, that this was a conditional sale and not a mortgage.

Perry v. Meddowcroft, 4 Beavan, 157.

## 2. What shall not be deemed a Mortgage.

B conveyed real estate to A; immediately after the delivery of the deed, A gave to B a writing binding herself if B should within three years give her a certain sum, (the consideration mentioned in the deed,) with interest, to deliver up to B such deed, but if B should fail to bring the money by the time limited, he was to forfeit all claims to such deed. Held, that this was not a mortgage, as there was no debt to be secured, but a contract to reconvey on certain terms.

Reading v. Weston, 7 Conn. 143. *Sed vide* Rice v. Rice, 4 Pick. 349.

When there is an actual sale for a valuable consideration between the parties, with a right to repurchase, the transaction will not be considered a mortgage.

Flagg v. Mann, 2 Sumn. 490. See Chambers v. Hise, 2 Dev. & Bat. Eq. 305; Holmes v. Grant, 8 Paige, 243; Robinson v. Cropsey, 8 Paige, 480; S. C. 2 Edw. 138; Dougherty v. McColgan, 6 Gill & Johns. 275; Bransone v. Frayser's executors, 10 Leigh, 592; Hammonds v. Hopkins, 3 Yerg. 525.

A mortgage of land cannot be made by parol.

Bowers v. Oyster, 3 Penns. R. 240. But in New York, an absolute deed on the face of it, may be converted into a mortgage by parol testimony. McIntyre v. Humphreys, 1 Hoff, 31.

When a deed is absolute on the face of it, it will not be declared to be a mortgage, on the testimony of a witness that a previous agreement had been made for a mortgage. Parol testimony can only be acted on when there has been a fraud or imposition in making the instrument differently from what was agreed on.

McLaurin v. Wright, 2 Iredell, 94. See 3 Hawks, 423; 2 Dev. Eq. 558; Ibid, 373; 2 Dev. & Bat. Eq. 358; 1 Iredell, Eq. 221, 290. But see Brown v. Wright, 4 Yerg. 57.

## (C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.

It is a universal rule in equity that "once a mortgage always a mortgage," and, therefore, no subsequent agreement can change it to an absolute conveyance.

Clark v. Henry, 2 Cowen, 324; Wheeland v. Swartz, 1 Yeates, 584. See Barnes v. Lee, 1 Bibb, 526; Hawkins v. King, 2 A. K. Marsh, 109.

The mortgagor before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited, or not, hath the legal estate in him; also, after forfeiture he hath an equity of redemption; so that he is still considered as owner and proprietor of the estate, until the equity

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of redemption be foreclosed, and therefore may make (a) leases, or (b) any settlement thereof, which will bind his equity of redemption.

{A mortgagee in fee may enter immediately after the execution of the mortgage, put out the mortgagor, and receive the profits, if there be no agreement to the contrary : and he may, if the mortgagor refuse to deliver possession, recover the land by an action. 3 Mass. T. Rep. 138, *Newall v. Wright*; 2 Mass. T. Rep. 495, *Erskine v. Townsend*; 4 Johns. Rep. 216, *Jackson v. Dubois*. See 3 Mass. T. Rep. 560, *Hill v. Payson*. In Pennsylvania too a mortgagee may bring an ejectment. So also may the assignee of his administrators; for his heir is a trustee for them or their assignee, and a *cestui que trust* may, in Pennsylvania, where there is no court of chancery, maintain an ejectment in his own name. 1 Bin. 175, *Lessee of Simpson v. Ammons*; 1 Dall. 72, *Kennedy v. Fury*.} (a) The mortgagor being considered in the nature of a tenant at will, it follows, that if he makes a lease subsequent to the mortgage, the mortgagee may treat the lessee as a wrongdoer, or not, at his election. Cro. Ja. 660; Cro. Car. 303. β The mortgagor is the owner of the land, and is to be regarded as such for every purpose, except the right of possession. *Barkamsted v. Farmington*, 2 Conn. 600; *Toby v. Reed*, 9 Conn. 216. γ If the mortgagee permits the lessee to enjoy his lease, the mortgagor may thenceforth be considered as a receiver of the rent, or, in some sort, a trustee for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay the rent to the mortgagor any longer. 1 Atk. 606. But if the mortgagee elects the other alternative, the lessee may be turned out by an ejectment, he being in under a person who had no power to under-let, but subject to eviction by the mortgagee. *Keech v. Hall*, Dougl. 21. {And no notice to quit is in this case necessary; nor to the mortgagor himself, if he continues in possession. Ibid. 3 East 449, *Thunder v. Belcher*; *contra*, 2 Johns. Rep. 75, *Jackson v. Laughhead*; Ibid. 87, 4 Johns. Rep. 186, *Jackson v. Green*. See 2 Johns. Rep. 84, *Jackson v. Chase*; 4 Johns. Rep. 215, *Jackson v. Fuller*.} But if there is tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to six months, notice from the mortgagee. *Birch v. Wright*, 1 Term R. 378. Though the tenant be in possession under a lease prior to the mortgage, yet the mortgagee, after giving notice, is entitled to the rent in arrear at the time of the notice, as well as to what shall accrue afterwards, and he may distrain for it after such notice. *Moss v. Gallimore*, Dougl. 279;] § *Pope v. Biggs*, 9 Barn. & C. 245, which seems to overrule *Alcorno v. Gomme*, 2 Bing. 54.} β The mortgagee, as against the mortgagor and all persons claiming under him, is taken to be the owner of the fee; and as the right of possession follows the right of property, if there be no clause or agreement to restrain it, he is entitled to possession before condition broken, and is liable to be dispossessed only by performance of the condition at the time limited. *Erskine v. Townsend*, 2 Mass. 493; 8 Mass. 551; *Goodwin v. Richardson*, 11 Mass. 469; *Fay v. Brewer*, 3 Pick. 203; *Flagg v. Flagg*, 11 Pick. 475; *Blanchard v. Brooks*, 12 Pick. 47; *Fay v. Cherey*, 14 Pick. 399; *Bradley v. Fuller*, 23 Pick. 1. γ (b) It is said, that a tenant in tail of an equity of redemption may devise it for payment of debts. Vern. 41, *Turner v. Gwinn*. § But this doctrine was overruled by *Kirkham v. Smith*, Amb. 518, where Lord Hardwicke decided, that an equitable remainder on an estate tail was not barred by a settlement and will; and it is now established that an equitable entail and remainders are only barrable, like legal entail and remainders, by fine or recovery. See *Legatt v. Sewell*, 2 Vern. 552. The recovery may be suffered without the concurrence of the mortgagee. *Nouaille v. Greenwood*, 1 Turner, R. 26.} [A being seised of the lands in question in fee, mortgaged the same for two several terms of 1000 years each, and afterwards made his will, by which he devised those lands to L L, his heir at law, and to the heirs male of his body, remainder to B for life, with contingent remainders to his first and other sons in tail, remainder to G D for life, with remainder to his first and other sons in tail, remainder to his own right heirs, and died: afterwards L L being seised of the lands in question under the will, and also of other lands in fee of a very considerable yearly value, made his will, by which he bequeathed to his mother the sum of 2000*l.*, and then directed and appointed that his executor should pay off and discharge all mortgages and encumbrances laid and charged upon his estate in Sussex, being the lands in question, and particularly mentioned the two aforesaid mortgages for years, and then directed and appointed that the said several mortgage leases should be kept on foot; and upon payment of the several sums of money due upon the same should be assigned by the mortgagee to his mother, dame M S, for her sole use and benefit, during the remainder of the several terms, in the said several mortgages contained; and further devised a yearly rent-charge of 100*l.* to his mother for life, to be

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issuing out of all his manors, &c., in the several counties of Hertford and Bedford. Then the will went on:—"and as for and concerning all and every my manors, messuages, lands, tenements, and hereditaments, which I the said L. L. am now seised of in law or in equity, or which I have a power to give or charge, I do give and dispose the same in manner following;"—and then he appointed, that if his wife proved with child, and such child should be a son, that his son should have all his aforesaid manors, &c., in tail, remainder to his cousin W. L., the defendant in the original cause, and to his heirs: And if the said after-born child should prove a daughter, he appointed that 5000*l.* should be raised out of the profits of his said estate for such daughter; and if his wife were not with child at the time of his death, then he devised all his said manors, &c., to his said cousin W. L., and his heirs for ever. The testator died, his wife not having been with child. S. B. and G. D. both died without issue. Then the plaintiff, as representative to dame M. S. brought a bill, praying an assignment of those terms; and the defendant brought a cross-bill, praying to be let in to redeem as devisee of the reversion by the will of L. L. And the question was, Whether the equity of redemption, which the testator had, incident to the reversion in fee, as heir at law of the mortgagor, was severed from the reversion by the devise, and given to dame M. S.; and so those terms vested in her irredeemable by the devisee of the reversion? or, whether those terms were devised to her only as securities for the original mortgage-money, and so subject to be redeemed by him that should have the inheritance? And it was decreed by the Lord Chancellor King, assisted by Lord Chief Justice Raymond, and Mr. Justice Deaton, that the devisee of the reversion under the will of L. L. should be let in to redeem; for that the testator did not otherwise intend these mortgages for his mother, than as securities for so much money. *Amhurst v. Litton*, Fitt. 99.] [See *Rex v. Abbott*, 3 Price, 195; 10 Mod. 423; and note, Powell, p. 260, (6th ed.)]

Therefore, if a man mortgages his land, and, as is usual, still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred; for though the mortgagee be, in reality, out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is no less than a fraud which the law will not countenance.

Sid. 460; Vent. 82; Lev. 274; Carth. 101, 414.

And as the mortgagor, being considered only as tenant at will (e) to the mortgagee, cannot, by his act, defeat the interest of the mortgagee, otherwise than by payment of the mortgage-money; so neither can the mortgagee defeat the mortgagor of his equity of redemption: therefore, if a mortgagee in fee suffers a recovery, this, even at law, shall not bind the mortgagor's right of entry, upon performance of the condition. But if the mortgagor had been a party to the recovery, then his right had been bound, not only on account of the recompense in value, but because he is estopped by the recovery to claim the land against the recoverer, or his heirs, when he was called in before the judgment given to defeat his title, and could not do it.

Palm. 135; Cro. Ja. 593. [(a) See note p. 31, *ante*.]

So, if a mortgagee be disseised, and the disseisor levy a fine, and five years pass after the proclamation, though the mortgagee is hereby barred, yet if the mortgagor pay, or tender his money, he has five years to prosecute his right, by the second saving in the statute of 4 H. 7, c. 24, because his title did not accrue till payment of the money.

Plow. 373 a. § A mortgage lien can be raised only by a reconveyance from the mortgagee, or by an absolute payment of the mortgage-money. *Heard v. Isham*, Freem. Miss. R. 79. g

§ A mortgage of land before foreclosure or entry for condition broken, is personal estate.

*Johnson v. Bartlett*, 17 Pick. 477. See *Jamieson v. Bruce*, 6 Gill & Johns. 73; *Evans*



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*v. Merriken*, 8 Gill & Johns. 39; *Mussina v. Bartlett*, 8 Port. 377; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Barnes v. Lee*, 1 Bibb, 526; *Chase v. Lockerman*, 11 Gill & Johns. 186.

Until the mortgage is actually paid off by the consent of the mortgagee, or by the decree of the court, he retains his character as mortgagee, with all the rights incident to it.

*Grugeon v. Gerrard*, 4 Y. & Coll. 119. See *Pell v. Stephens*, 1 Coop. temp. Brough. 266.

In Pennsylvania, a mortgage is considered as a mere security for the debt, and as to third persons, the mortgagor is treated as the real owner to all intents.

*Schuylkill Company v. Thoburn*, 7 S. & R. 419; *Simpson v. Ammons*, 1 Binn. 177; *Wantz v. Dehaven*, 1 S. & R. 317.

But the mortgagee may, in that state, maintain ejectment.

1 Binn. 176; *Smith v. Shaler*, 12 S. & R. 243; *Knaub v. Esseek*, 2 Watts, 289.

A mortgagee has no estate, property, nor interest in the land, until he takes possession.

*Myers v. White*, 1 Rawle, 355.

Premises were mortgaged in fee, and there was no contract, express or implied, for the mortgagor remaining in possession until default; held, that the right of entry accruing from the date of the condition of the conveyance, and not from the date appointed for the payment of the purchase-money, and above twenty years having elapsed from the former date without payment of any interest, the heir of the mortgagor was not entitled to maintain ejectment.

*Doe v. Lightfoot*, 8 Mees. & W. 553.

Fixtures, and additions in the nature of fixtures, which are placed in a building by a mortgagor, after he has mortgaged it, become part of the realty, as between him and the mortgagee, and cannot be removed, or otherwise disposed of by him while the mortgage is in force.

*Winslow v. Merch. Ins. Co.*, 4 Metcalf, 306. See *Holly v. Brown*, 14 Day, 255.

Where a fulling-mill and land were sold, and mortgaged back to the grantor to secure the payment of the purchase-money, and by his bond of the same date he entered into certain stipulations respecting the liberties and immunities which the grantees should enjoy, in the use of the water, dam, &c.; and covenanted that he would build for them certain machinery for their mill, and that he would not follow nor permit others to pursue the same business there, while it should be followed by the grantees, and reserved to himself the use of a room in the premises for a limited time: held, that these stipulations amounted to a covenant that the mortgagors should occupy the premises so long as they continued to fulfil the conditions of their deed of mortgage, and they constituted a good bar to a writ of entry at common law, brought by the mortgagee.

*Bean v. Mayo*, 5 Greenl. 89.

The mortgagee has no right to claim the benefit of a policy of insurance, underwritten for the mortgagor, or the mortgaged property, in case of loss by fire.

*Columbia Ins. Co. v. Lawrence*, 10 Pet. 507.

[[PRESENTING TO BENEFICES.]]—And as the mortgagor, till the equity of the redemption be foreclosed, is considered as owner of the land, it was

1. ~~Insurance~~ - the **Warranty and Mortgage**.

which, where a bill of exchange was brought against a mortgagee in possession, was a proper answer. That a mortgagee, before the account was, having transferred to a third party, should revoke his assignment, and that such a person as the mortgagor or his vendee is having possession of the subject amount.

See Gally v. Selby, 1 Str.  
Ransom v. Jago, Bunb. 130.  
A mortgagee is deemed seised as to  
Crown, 195; Astor v. Miller,  
Prescott v. Smyth, 1 Mc Cord's  
Parrish v. Parker, 7 Mass. 355; Goodwin  
Mass. 275; Eaton v. Whiting,  
14 Pick. 399; Brad-  
Barkamsted v. Farmington,

In the case of *Hardwicke v. Graham*, the mortgage was of a long term in a future mortgage, and therefore a distinction was attempted; because the mortgagee could have no other satisfaction than by providing for a child, widow, or tenant, in the mortgagee's remaining word; and the rather, for that it was expressly so stated in the mortgage-deed; but the court gave no opinion thereupon. And in the case of *Mackenzie v. Robinson*, which was the case of a mortgage of a future mortgage, Lord Hardwicke doubted the equity in such a covenant, *but the mortgagee should present*, it being a stipulation for something more than principal and interest; and the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting, in consequence whereof an order was made that the mortgagee should have liberty to present, and the mortgagee was obliged to do so in his mortgage.

Wash. 214: *Washington v. Brown*, 3 Ark. 560.

But, if the mortgagee present to an alienation, a bill, by the mortgagor, to cancel the incumbrance to ~~cancel~~ and to deprive him of his living, will be dismissed, unless brought within six months after the death of the last incumbrance. In such case the mortgagee, instead of bringing a foreclosure, should bring a sale of the alienation.

(Citation v. Citation, 3 N.J. 403; 3 122 436. [Take part in Semons, as to a sale  
which started in 1900.]

A mortgagee takes the estate mortgaged in the same plight that it is in, in the hands of the mortgagor. If the mortgagor, therefore, has done any act that amounts to a forfeiture, the mortgagee will lose his security. Thus, *Isaacs v. Is.*, with remainder to his wife for life, remainder to his sons in strict succession, remainder over, having occasion for money, together with his wife mortgaged the estate settled by way of lease and release and fine, *Isaacs v. Is.*, which mortgage was afterwards assigned to the plaintiff, and another lease and release and fine levied and executed by the husband and was not making good the assignment. The husband died, and a bill was brought against the widow and eldest son to compel them to redeem or to purchase them, and to be relieved against the forfeiture. The defendant, the son, pleaded the marriage settlement of his father and mother, who were both farmers for lives, and insisted on the forfeiture; and the court allowed the plea, the Lord Chancellor saying, that this was a contrivance to destroy the settlement and disinherit the son; and his lordship said, he had so decided in many cases, particularly in the case of *Sir Harry Peachy* and the *Duke of Newcastle*.

41. *Iturbide v. Iturbide*, 179 Cal. 391. See *Willis v. Finney*, *Ibid.* 108.

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A mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may encumber the mortgagor. He can make no lease of the lands for years to an under-tenant. Thus in the case of *Hungerford v. Clay*, the bill was for redemption on payment of principal and interest. The substance of the answer was, that the defendant, the mortgagee, had made a lease of the house for five years at a rent reserved, with a covenant that the lessee should have the option of a farther lease for four years after the expiration of the said term; that the term for five years was now expired, and the lessee desired to take the premises for four years longer; that, if the plaintiff would grant such lease, the defendant would reconvey on payment of principal and interest. On hearing this case at the Rolls, the defendant had a decree; but, on appeal to the Chancellor, his lordship was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not lease the premises for years to bind the mortgagor, unless, to avoid an apparent loss, and merely in necessity: and the decree at the Rolls was reversed.

*Hungerford v. Clay*, 9 Mod. 1; 2 Eq. Ca. 610.

§ When a mortgagee obtains a renewal of a lease, or any other advantage, in consequence of his situation as mortgagee, the mortgagor coming to redeem is entitled to the benefit thereof.

*Slee v. Manhattan Company*, 1 Paige, 48.

A mortgagee in possession, who has clearly manifested his intention to hold as absolute owner, has a title and a possession not adverse to, nor inconsistent with the right of the mortgagor. The mortgagee's estate is in many respects a trust, and in chancery he is, in general, considered as a trustee, in whose favour the principle of the statute of limitations, or bar by lapse of time, does not apply, until a satisfaction or dereliction of the demand secured by the mortgage must be presumed.

*Fenwick v. Macy*, 1 Dana, 280.

A mortgagee in possession has no right to pay any of the produce of the estate to the mortgagor, after notice to pay such receipts to a prior mortgagee.

*Archdeacon v. Bowes*, 1 M'Clell. 165.

A mortgagee who has taken his debtor in execution, is, nevertheless, entitled to the benefit of his mortgage security.

*Davis v. Battine*, 2 Russ. & My. 76.

A mortgagee may pay off a senior encumbrance, and on a bill filed to foreclose, and to be reimbursed the sum he has paid, he is entitled to a decree of indemnity out of the proceeds of the sale of the mortgaged premises.

*Dale v. M'Evers*, 2 Cowen, 118. See *Silver-lake Bank v. North*, 4 Johns. Ch. 370.

|| WASTE BY MORTGAGEE. ||—And as a mortgagee cannot, before foreclosure, exercise any act of ownership that will attach on the estate, but ought to reconvey the premises free from all encumbrances; so neither can he justify, in equity, the commission of any act which may injure the estate; therefore, though at law a mortgagee in fee may commit waste, yet he will be restrained in equity. Thus, on a bill to redeem a mortgage, wherein an account was decreed, and 250*l.* reported as due, and exceptions taken to the report; it being, on motion and reading affidavits, shown, that the defendant had

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burnt some wainscot and committed waste, the defendant was ordered to deliver up possession to the plaintiff, who was a pauper, he giving security to abide by the event of the account.

*Hanson v. Derby*, 2 Vern. 392.  $\beta$  A mortgagee in possession is chargeable for waste. *Givens v. M<sup>c</sup>Calmont*, 4 Watts, 460.*g*

So, where the mortgagee of an estate in fee had cut down trees, on application to the court it was decreed, that an account should be taken of what was cut down, and the produce applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and an injunction was granted to stay felling any more.

$\beta$  A mortgagee in possession is chargeable with waste; but what is waste and what is not, as respects the clearing of timber land, must depend on the particular circumstances of the case.

*Givens v. M<sup>c</sup>Calmont*, 4 Watts, 460.*g*

But a distinction is made where the security is defective; for, in that case, the court will not restrain a just creditor from his legal privileges; but then the timber, when cut down, must be applied to ease the estate, and not to the mortgagee's benefit.

*Withrington v. Banks*, Sel. Ca. Ch. 31.

However, although the mortgagee cannot, to better his security, do any act to encumber the estate mortgaged, which will be valid against the mortgagor after redemption, nor will be justified in committing waste, yet he will be entitled to such expenses as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry interest.

3 Atk. 518. [See *Trimleston v. Hamil*, 1 Ball & B. 377, and see *post*, (F.)]

Thus, if a leasehold estate be mortgaged, and there is no covenant on the part of the mortgagor, that he should procure the lives to be filled up, the mortgagee cannot compel him to do it; but must pay the expense of renewing, and reimburse himself by adding it to the principal of the mortgage, and it shall carry interest. So it was determined in the case of *Manlove v. Ball and Bruton*, which was a mortgage of a church lease for three lives, two of which died during the time the estate was in mortgage, and were renewed on fines paid by the mortgagee.

3 Atk. 4, *Lucam v. Mertins*, 1 Wils. 34; *Manlove v. Ball et al.*, 2 Vern. 84. *supra*; [1 Ball & B. 202.]

A term assigned in trust to attend the inheritance will, in equity, follow all the estates created thereout, and all the encumbrances subsisting upon such inheritance, and is so connected with it, that equity will not suffer it to be severed to the detriment of a *bond fide* purchaser. Therefore, a mortgagee shall have the benefit of all the interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice; and, consequently, if there be a term in a mortgaged estate held in trust for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the trustees of such a term assigned to attend the inheritance will, in equity, become trustees for the mortgagee of the inheritance.

Vide 3 Atk. 476, 477; *Charlton et al. v. Low et al.*, 3 P. Wms. 328. [See as to the assignment of attendant terms, *Sugden, V. & P.* 385, (6th ed.) *Butler, Co. Lit.* 290 b, n. (1), § 13, and *Powell*, 477 a, note (6th ed.)]

If a mortgage be made of an estate to which the mortgagor has not a good

## (C) Interests of the Mortgagor and Mortgagee.

title, and then he who has the real title conveys to the mortgagor, or his representatives, with a good title; the mortgagee will be entitled, in equity, to the benefit of it; for it will be considered there as a graft upon the old stock, and as arising in consideration of the former title.

As, where houses and lands were demised for a long term, and an assignee of the lease, believing he had a good title, mortgaged it for 100*l.*, afterwards the title turned out to be bad, the estate belonging to another person. Then the real owner of the estate, out of compassion to the assignee, who had built upon it, leased the premises for a long term to trustees for his wife, he being run away. And on a bill filed, the trustees were decreed to make a new mortgage to the mortgagees; the Master of the Rolls saying, that this was a graft on the old stock, all the benefit of it, except the rent reserved, arising in consideration of the former title.

*Seabourne v. Seabourne*, 2 Vern. 11.

If a mortgagee procures a grant of a new term after the old one be actually expired, yet this will be a trust for the mortgagor, and redeemed with the principal; for it is supposed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as such regard is had to it, in the estimation of the world, it will be looked on as the occasion of the lease.

*Rakestraw v. Brewer*, Sel. Ca. in Ch. 35; *Lee v. Vernon*, 7 Bro. Par. Ca. 432.]

§ A, the lessee of land, was in possession under a lease, afterwards he took a mortgage of the same land from B, the lessor; held, that he must be considered as holding under the lease until he has made an election to hold under his subsequent mortgage, or done some act equivalent, and given notice of such election to the lessor.

*Newall v. Wright*, 3 Mass. 138; *Wood v. Felton*, 9 Pick. 171.*g*

||QUALIFICATION TO VOTE, AND TO SIT IN PARLIAMENT.||—By the 7 W. & M. c. 25, it is enacted, “That no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust.”

And by the 9 Ann. c. 5, which requires that knights of the shire should have 600*l. per annum*, and every other member 300*l. per annum*, it is enacted, “That no person shall be qualified to sit in the House of Commons, within the meaning of the act, by virtue of any mortgage, whereof the equity of redemption is in any other person, unless the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of his election.”

§ An inhabitant of one town in Connecticut, purchased lands of another and took an absolute deed in fee, of the value of one hundred and ninety dollars: he immediately went into possession and resided on the premises about two years, having at the time of taking such deed given back a mortgage to secure one hundred and forty dollars, part of the purchase-money. Held, that he acquired, by such absolute deed and residence, a settlement in the latter town.

*Barkamsted v. Farmington*, 2 Conn. 600.*g*

||LIABILITY TO COVENANTS.||—[On the assignment of a term by way of  
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## (C) Interests of the Mortgagor and Mortgagee.

mortgage, the mortgagee, before actual possession, is not liable to the arrears of rent, and other covenants in the original demise.

*Eaton v. Jaques*, Doug. 455; *Walker v. Reeves*, Ibid. 461, note. ¶ But the case of *Eaton v. Jaques* has been expressly overruled; and it is now settled, that the assignee of a lease by way of mortgage is liable on the covenant for payment of rent, though he has never taken actual possession, since the assignment vests in him the whole legal interest. *Williams v. Bosanquet*, 1 Brod. & B. 238; 3 Moo. 100. A mortgagee, therefore, for safety should only take an underlease of the premises for a term wanting a day or week of the original term; but he should have an express covenant to indemnify against the rent, as he would be liable to a distress. See *Powell*, 185 a, (6th ed.)

But, if the mortgagee enters into possession, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and enjoying the profits, he must submit to the losses.

*Traherne v. Sadleir*, 1 Bro. Parl. Ca. 105.

And if a mortgagor, by a mortgage of a term vested in him, divests himself of all interest therein, in the consideration of a court of law, he retains only the equity of redemption, which he must pursue in a court of equity; and therefore, if he join with his mortgagee in a lease, in which the lessee is made to covenant with the mortgagor for rent, repairs, &c., such covenants will be merely collateral to the mortgagee's interest in the land, and the assignee of the mortgagee cannot maintain an action for the breach of them on the statute of 32 H. 8, c. 34.

*Webb v. Russell*, 3 Term R. 393.

These covenants, therefore, must be considered as *covenants in gross*, upon which, of course, the mortgagor may maintain an action. And so it was determined on the same instruments, and between some of the same parties, in the case of *Stokes against Russell*, in the Court of King's Bench.

*Stokes v. Russell*, 3 Term R. 678.

¶ The devisee of the equity of redemption (the legal fee being in a mortgagee) is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor.

*The Mayor, &c. of Carlisle v. Blamire*, 8 East, 487.¶

¶ WASTE BY MORTGAGOR.¶—If a mortgagor commit waste, whether it be a mortgage in fee or for a term of years, the court, on a bill by the mortgagee to stay waste, will grant an injunction; for they will not suffer a mortgagor to prejudice the encumbrance.

*Farrant v. Lovel*, 3 Atk. 723; *Brady v. Waldrons*, 3 Johns. Ch. R. 148.¶ {See 8 Ves. J. 105, *Hampton v. Hodges*; 2 Hen. & Mun. 25, *Scott v. Wharton*.}

¶ Where the mortgage was of land, wood, and underwood, (a) the Lord Chancellor decided, that it was not waste in the mortgagor to cut the underwood at seasonable times, it being the ordinary fruit of the land, but the mortgagor having become bankrupt, an injunction was granted against cutting the underwood, on the ground that the mortgagee was entitled to have the estate in the plight in which it was at the date of the bankruptcy, and to prove the rest of his debt.

*Hampton v. Hodges*, 8 Ves. 105. (a) As to what is underwood, see *Rex v. Ferrybridge*, 1 Barn. & C. 375.

But the mortgagee is entitled to an injunction to restrain the mortgagor from cutting timber, if the land without it is a scanty security.

*Humphreys v. Harrison*, 1 Jac. & W. 581.¶ *β* A mortgagee of real estate, not in possession, is not entitled to the emblements severed by another person. *Toby v. Reed*, 9 Conn. 216.¶

## (C) Interests of the Mortgagor and Mortgagee.

A mortgagor is never permitted to dispute the title of his mortgagee; because no man is permitted to dispute his own solemn deed.

Cowp. 601; *Palmer v. Mead*, 7 Conn. 149; *Broom v. Beers*, 6 Conn. 198.*g*

A mortgagor *in possession* gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge to him for security of his money, and the original ownership of the land still residing in the mortgagor, subject only to the legal title of the mortgagee, so far as such title is requisite to the end of his security.

Doug. 610; *Barkamsted v. Farrington*, 2 Conn. 600.*g*

But, if the mortgagee evict the mortgagor and take possession, the mortgagor, though afterwards occupying permissively for a particular purpose, will not thereby gain a settlement.

*Rex v. Catherington*, 3 Term R. 771.]

||MORTGAGOR NOT TO ACCOUNT TO MORTGAGEE.—Although the mortgagee may assume the possession by ejectment at his pleasure, and, according to the case of *Moss v. Gallimore*, Doug. 279, may give notice to the tenants to pay him the rent due at the time of the notice, yet if he suffers the mortgagor to remain in possession, or in the receipt of the rents, it is a privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee; even although the security be insufficient.

*Colman v. Duke of St. Alban's*, 3 Ves. jun. 25, and vide 2 Atkins, 107.

So, where a mortgage was made for 1000*l.*, the property being in lease, the mortgagor became bankrupt, and the mortgagee gave notice to the tenant to pay the rent to him, notwithstanding which the assignees received the rent. On a petition by the mortgagee that the assignees should pay him the rent received, Lord Chancellor Eldon said, that admitting the case of *Moss v. Gallimore* to be sound law, he had often been surprised by the statement, that the mortgagor was receiving the rents *for the mortgagee*; a mortgagee never could in that court make the mortgagor account for the rent for the time past. The consequence was that the mortgagor did not receive the rents for the mortgagee.

*Ex parte Wilson*, 2 Ves. & B. 252.

So, also, where a trust term was mortgaged by the trustees, and under certain collateral proceedings, *distinct* from the mortgage, a receiver had been appointed, and the surplus rents paid into court, and a portion of the money remained due on the mortgage when the term expired by effluxion of time. The mortgagees applied to the court for an account of the rents and profits which had come to the hands of the receiver from his appointment to the expiration of the term, but the motion was refused; and the Lord Chancellor said, he thought that the mortgagee of a term, if he chose not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee who had suffered the rents to be applied for purposes other than the security.

*Gresley v. Adderley*; *Gresley v. Heathcote*, 1 Swanst. R. 573.

LEASE AND LOAN.—As equity looks strictly to the real relation between the mortgagee and mortgagor, that of lender and borrower, notwithstanding the legal ownership is in the mortgagee, courts of equity protect the mortgagor from any oppressive advantage which the mortgagee may seek to derive from the possession of the absolute legal estate. Therefore it has been decided by Lord Redesdale, Chancellor of Ireland, that the mortgagee can-

## (D) Of the Legal Performance of the Condition.

not accept a lease of the premises from the mortgagor even at a fair rent. The facts of the case were, that Webb, having mortgaged to Rorke, afterwards executed a lease of part of the land to Rorke for 999 years at a yearly rent. A bill was filed by the heirs of Webb against the heirs and personal representatives of Rorke, charging that the lease was made at a gross undervalue, and in consequence of threats of foreclosure, and that the rent had never been paid, and praying a re-assignment of the lease to the plaintiff, and that the same might be declared void, and that defendant might account for the real value of the lands from the date. The answer insisted that the lands were let at a fair value, and without threat. Two issues were directed: 1st, Whether the lease was voluntarily granted; 2d, Whether the rent reserved was a fair rent; both which issues were found in the affirmative. On the hearing in equity, Lord Redesdale considered he was mistaken in directing the issues, and decreed the lease to be set aside as contrary to public policy, and the spirit of the laws for preventing usurious contracts.

Webb v. Rorke, 2 Scho. & Lefroy, 661; and vide Gubbins v. Creed, 2 Scho. & Lefroy, 214. Long acquiescence, however, will render such transactions unimpeachable. Hickes v. Cooke, 4 Dow. P. C. 16.

But it has been decided, that a lease granted as a security for an advance, and at a fair rent, to be applied in discharge of the debt, is a valid security by way of *mortgage*; the Lord Chancellor of Ireland (*Manners*) distinguishing this from the cases of *absolute* leases by the mortgagor to the mortgagee, which are held void. In the same case, however, a further lease granted thirteen years after the original lease for a term of twenty years at the *same rent*, in consideration of a further advance, was set aside as fraudulent.

Morony v. Odea, 1 Ball & B. 117.]

Where lands subject to a mortgage are sold under a decree of foreclosure, the emblements of a lessee are protected, and do not pass to the purchaser under a decree.

Cassily v. Rhodes, 12 Start. 88.

Where there is a lease of a lot of ground from year to year with a covenant not to assign, and if an assignment be made that the lessor may enter and hold, paying for the building and improvements thereon erected, and the lessee mortgages to the lessor such buildings and improvements, the mortgage is good though not accompanied nor followed by possession.

Luckenbach v. Brickenstein, 5 Watts & Serg. 145.]

## (D) Of the Legal Performance of the Condition.

THE condition must at law be strictly performed, otherwise the mortgagor loses all benefit of redemption; but if upon a mortgage a tender be made of the money at the place at any time of the day specified in the condition, and the mortgagee refuse, the condition is saved for ever.

7 E. 4, 3; 9 H. 6, 12; 22 H. 6, 37; 47 E. 3, 26; Plow. 173; 5 Co. 114; Co. Lit. 209.

And upon such refusal the land is discharged, because upon the tender the demise is void; and if it be upon a feoffment, the condition is performed, and the feoffor may re-enter. But the money lent doth yet remain a debt or duty, because it was a debt by the original lending of the money, whether it had been so secured or not; and though the security fails, according to the words of the agreement, yet there is the same natural



## (D) Of the Legal Performance of the Condition.

justice that the money should continue: but, if a feoffment were made, on condition of payment of a sum gratuitously, to re-enter, if it were refused, there is no remedy.

Co. Lit. 209.

The legal tender, or payment, must be made to the parties mentioned in the condition; because, to make such a tender as will be a legal performance, it must be made according to what the parties have expressly agreed on in the condition.

Therefore, if a man bargains and sells lands, with proviso, that if the vendor, before such a day, pay so much money to the vendee, his heirs or assigns, that the sale shall be void; the vendee before the day makes his executors, and dies, and the vendor tenders the money to the executors, this is not good, because the word *assigns* must be understood to be assigns of the land, in its primary and original signification; and where there is an express provision to whom the tender and payment is to be made, the executor is excluded; for *expressum facit cessare tacitum*.

Dyer, 180, 181; Co. Lit. 210.

But, if a man make a feoffment in fee, upon condition that the feoffee shall pay 20*l.* to the feoffor, his heirs or assigns; here, the primary signification of the word *assigns* fails, because there can be no assignment of the land of which he hath enfeoffed another; and since the original sense of the word fails, lest it should be wholly insignificant, the secondary sense of the word is to be taken, viz.: the assignees in law, which the executors are *quoad* the personal estate; and therefore the payment is good either to the executor or to the heir.

Co. Lit. 210; 5 Co. 96.

If the condition be to pay the money to the feoffee, in mortgage, his heirs or assigns, and he make a feoffment over, it is in the election of the feoffor to pay the money to the first or second feoffee, because by the words he may pay it either to him or the assignee. So, if the first feoffee die, in this case he may pay it to his heir or the assignee, for the same reason; nor is he obliged to take notice of the validity of the second feoffment, to which he is a stranger.

Co. Lit. 210.

But if the condition was, that the feoffor should pay it to the feoffee at such a day, and the feoffee die before the day, it shall be paid to the executor, and not to the heir, though the land descend to the heir; for during the suspension of the condition, which is till the whole time is elapsed, the land is wholly taken to be a pledge for the money, and the money to be a personal duty to the feoffee, and, consequently, is to be paid to such person as represents him; but then this payment must be to the executor of the whole sum; for a partial and fraudulent payment, though accepted by the executor, is really no performance of the condition, and therefore the interest remains in the heir at law.

Lit. § 339; Co. Lit. 209; 5 Co. 96.

If the condition were, that the feoffor should pay so much money to the feoffee, without limitation of time, the feoffor hath time during life to pay the money to the feoffee during his life; but if either die before the time which is set by the parties for the performance of the condition is elapsed, the feoffment is absolute; but if the payment were to be made to the feoffee, his heirs or executors, then the feoffor hath time during life.

Lit. § 337.

## (E) Equity of Redemption and Foreclosure.

If a man make a feoffment in fee, upon condition that the feoffor, within a year after the death of the feoffee, pay to his heirs, executors, or administrators, 100*l.*, that then the feoffor should re-enter; the feoffee make a feoffment over, and die; the feoffor pay the 100*l.* within the year, and the heir pay back 30*l.*, this is a partial and fraudulent payment, and no good performance of the condition, to defeat the estate of the feoffee: but if the whole money had been paid, it had been good, because the payment is to be made to the persons mentioned in the condition, and not to the assignee of the land, who is not named therein.

5 Co. 96.

¶ A mortgage given by a son to his mother contained a condition that he should "find her fire-wood for one fire, to be drawn and cut at the door, fit for use," she having the privilege of residing in his house by his husband's will. The house was destroyed by fire, and the mother took up her residence with another son, and demanded of the mortgagor that he should furnish her with fire-wood there, to which he answered he was not obliged to furnish it off the farm. She then demanded that he should furnish it at the old place, to which he replied that he would see about it, but he furnished none. Held, that this was a sufficient demand by the mortgagee, and refusal by the mortgagor to furnish the wood, to support an action on the mortgage.

*Fiske v. Fiske*, 20 Pick. 499.

If a mortgage be given to indemnify a surety from his liability, and the mortgagor do not pay the money at the time stipulated, so that the mortgagee is exposed to a suit, it is a breach of the condition of the mortgage.

*Shaw v. Loud*, 12 Mass. 447.

If a mortgage be given to secure the payment of a note payable by instalments, the failure to pay any instalment when it becomes due will be a breach of the condition of the mortgage, and the mortgagee may have an action to recover the possession of the lands mortgaged.

*Estabrook v. Moulton*, 9 Mass. 258.

Performance of the condition of a mortgage defeats the estate of the mortgagee, and the mortgagor is in his old estate.

*Erskine v. Townsend*, 2 Mass. 493; *Reading of Judge Trowbridge*, 8 Mass. 551; *Nugent v. Riley*, 1 Metc. 117; *Holman v. Bailey*, 3 Metc. 55.

Payment of the mortgage debt by one of all several mortgagors, will operate as a performance of the condition for them all.

*Taylor v. Porter*, 7 Mass. 355.

If the mortgagor tender to the mortgagee performance of the condition of the mortgage according to its legal effects, and the mortgagee refuse to accept the same, the mortgage is discharged; but the obligation to perform the condition will remain.<sup>(a)</sup> When the tender is made after condition broken, and before action brought, it will not operate a discharge of the mortgage.<sup>(b)</sup>

<sup>(a)</sup> *Darling v. Chapman*, 14 Mass. 101. <sup>(b)</sup> *Maynard v. Hunt*, 5 Pick. 240.*g*

(E) Of the Equity of Redemption and Foreclosure: And herein,

1. *Who may redeem, and by whom the Mortgage Money shall be paid.*

ALTHOUGH, after breach of the condition, an absolute fee-simple is vested at common law in the mortgagee, yet a right of redemption being still inhe-

## (E) Equity of Redemption and Foreclosure.

rent in the land till the equity of redemption be foreclosed, the same right shall descend to and is vested in such persons as have a right to the land, in case there had been no mortgage or encumbrance whatsoever: and as an equitable performance as effectually defeats the interest of the mortgagee as the legal performance doth at common law, the condition still hanging over the estate, till the equity is totally foreclosed; on this foundation it hath been held, that a (a) person who comes in under a voluntary conveyance may redeem a mortgage; and though such right of redemption be inherent in the land, (b) yet the party claiming the benefit of it must not only set forth such right, but also show that he is the person entitled to it.

Hard. 465. (a) Vern. 193. (b) Vern. 182; Chan. Ca. 74.

As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose; according to the doctrine established in the courts of equity, that the personal estate, in the hands of the executor, shall be employed in ease of the heir, by whatever means the heir becomes indebted as heir; for the personal estate having received the benefit by contracting the debt, and the real being considered only as a pledge for it, it is but reasonable that satisfaction should be made out of it; according to the common rule, *Qui sentit commodum sentire debet et onus*.

2 Chan. Ca. 5. Vide tit. *Heir and Ancestor*, and tit. *Executor*.

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenant to pay the money, and die, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the mortgage.

2 Salk. 449, pl. 3. [So, *Pockley v. Pockley*, 1 Vern. 36; *King v. King*, 3 P. Wms. 360; *Galton v. Hancock*, 2 Atk. 436; *Robinson v. Gee*, 1 Ves. 251; *Earl of Belvidere v. Rochfort*, 6 Bro. P. C. 520; *Phillips v. Phillips*, 2 Bro. Ch. Rep. 273.] {See title *Executors and Administrators*, L. 2.}

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *heres natus*, but also to an (c) *heres factus*, from a presumption, that it is the intention of the testator, that he should have all the privileges of the *heres natus*: And (d) some even hold, that an ordinary devisee shall have this benefit: but as to this last point it hath been (e) held otherwise; and that if a man mortgages his land, and then devises it to J S, or to A for life, the remainder in fee to B, that there the charge doth pass with the estate, there appearing no intention of the testator that he should have it discharged. (g)

(c) 2 Chan. Ca. 84. (d) Vern. 36. (e) Chan. Ca. 271. [(g) In a later case a contrary determination was given. There, the defendant's testator having made a mortgage of his lands for a considerable sum of money, by his will appointed them to be sold for payment of his mortgage-money, and afterwards devised the lands so in mortgage, as to one moiety thereof, to the plaintiff, &c., and made the defendant executor, and devised the personal estate to his executor for the payment of his debts. The single question was, Whether the personal estate should be applied to discharge the mortgage for the benefit of the devisee? And it was decided at the Rolls, that the personal estate should be so applied for the advantage of the devisee, and that decree was confirmed by the Lords Commissioners. *Johnson v. Milkrop*, 2 Vern. 112.—In the case of *Pockley and Pockley*, 1 Vern. 36, it was determined, that such debt on mortgage would lessen the widow's customary moiety in the province of York; for the custom cannot take place until after the debts paid. So, a mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part of the custom of London. *Bail v. Bail*, cited 1 P. Wms. 335.—And where lands are subject to or devised for payment of debts, such lands shall be liable to discharge mortgaged lands either descended or

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devised. *Bartholomew v. May*, 1 Atk. 487; *Marchioness of Tweeddale v. Coventry*, 1 Br. Ch. Rep. 240. Even though the mortgaged lands be devised expressly *subject to the encumbrance*. *Serle v. St. Eloy*, 3 P. Wms. 366. So, lands descended shall exonerate mortgaged lands devised. *Galton v. Hancock*, 2 Atk. 424. So, *unencumbered* lands and *mortgaged* lands, both being specifically devised, (but expressly "*after payment of all debts*,") shall contribute in discharge of such mortgage. *Carter v. Barnardiston*, 2 P. Wms. 505, 2 Bro. P. C. 1. In all these cases, the debt being considered as the *personal* debt of the *testator* himself, the charge on the real estate is merely collateral.]

[So, also, where the testator exempts his personal estate, and devises his mortgaged estate *subject to encumbrances*, and permits another estate to descend, the descended estate shall exonerate the mortgaged estate devised. *Barnewall v. Cawdor*, 3 Madd. 453; and see *Watson v. Brickwood*, 9 Ves. 447. But an estate *expressly* devised for payment of debts shall be resorted to before a descended estate. *Powis v. Corbet*, 3 Atk. 556. But not an estate specifically devised *charged* with payment of debts; for estates *particularly* devised are never applied till all other funds are exhausted. *Davies v. Topp*, 1 Bro. C. C. 524; *Wride v. Clarke*, cited 2 Bro. C. C. 261. And whether the descended estate is purchased before or after making the will, appears to make no difference as to its being applied before or after a devised estate. *Donne v. Lewis*, 2 Bro. C. C. 257; *Manning v. Spooner*, 3 Ves. jun. 114; *Milnes v. Slater*, 8 Ves. 295. The general order of payment, therefore, as laid down in *Davies v. Topp*, and confirmed by the other cases, is, 1st, out of the personal estate unless specially exempted; 2d, estates particularly devised for payment of debts; 3d, estates descended, whether purchased before or after will; 4th, estates specifically devised, though generally charged with payment of debts.]

So, if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere*.

2 Salk. 450; Vern. 37. β The purchaser of an equity of redemption takes such interest as defendant in the execution had; that is, the property subject not only to the first mortgage, but also to all other subsisting encumbrances. *Hartzhorne v. Hartzhorne*, 1 Green's Ch. 348; *Crow v. Tinsley*, 6 Dana, 402. See *Worthington v. Lee*, 2 Bland, 678; *Goring v. Shreve*, 7 Dana, 66.g

It has likewise been held by some opinions, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the mortgage, though there be no covenant in the mortgage-deed for the payment thereof; because the mortgage-money is a debt, whether there be any express covenant for the payment of it or not.

2 Salk. 449; Vern. 436; Peced. Chan. 61. [This guarded statement is no longer necessary: the law is now clearly settled as here laid down. For, by *Lord Talbot*, in *King v. King*, 3 P. Wms. 358, every mortgage implies a loan, and every loan implies a debt; and though there be no covenant or bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage. Hence, a decree of *Lord Harcourt* in the case of the mortgage of a ship, where the ship was taken at sea, and there was no covenant for payment of the money; and though the ship could not properly be said to be in nature of a pawn or *depositum*, since the mortgagor had sailed with the same to sea; nevertheless the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. So it is in the case of Welsh mortgages (*Howell v. Price*, *infra*.) where no day is appointed for the payment, but the matter is left at large. And see *Balsh v. Hyham*, 2 P. Wms. 455, S. P.]

But where a mortgage in fee was made, redeemable at Mich. 1702, or any other Mich. day following, on six months' notice; and there was no covenant for payment of the mortgage-money; it was held by my Lord Chancellor Cowper, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the mortgage, the personal estate should not be applied in ease and exoneration of the real estate, for the benefit of the heir at law; for, as he said, there being no covenant for payment of the money, there was no contract at all between

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them, neither express nor implied; nor would any action lie against the mortgagor to subject his person, or compel him to pay this money; but this was in the nature of a conditional purchase, subject to be defeated on payment by the mortgagor, or his heirs, of the sum stipulated between them, at any Mich. day, at the election of the mortgagor, or his heirs; so that here was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; and therefore there could be no equity of redemption, or any occasion for the assistance of the court; but the plaintiffs might even at law defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any Mich. day, to the end of the world; and since here was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor, he thought there was no reason to lay the load of this debt upon that which was given to other persons.

[*Howell v. Price*, Pr. Ch. 425; *Gilb. Eq. Rep.* 106, S. C. *totidem verbis*; 2 Vern. 701, S. C. It appears from the report in Pr. in Ch. & *Gilb.* that there was no decree upon the argument of this case in 1715, to which period of time these histories refer, but that precedents were ordered to be searched. The same case is reported by *Peere Williams*, but in a late stage of the cause, viz.: in 1717, upon the equity reserved after the trial of an issue that had been directed by the court. Upon that occasion Lord Chancellor seemed to be strongly of opinion, that the personal estate should be applied in ease of the real, the testator having said in his will, that his executors should, by his personal estate, pay and levy his debts; and this mortgage-money being a debt, his lordship decreed accordingly. 1 P. Wms. 291; 1 Eq. Ca. Abr. tit. *Heir and Ancestor*, (E.) pl. 7.]

Also, if the grandfather mortgages, and covenants to pay the mortgage-money, and the land descend to his son, and his son dies, having a personal estate and a son; the son's personal estate shall not go in aid of this mortgage.

2 Salk. 450.

||For it is an established rule, that the debt must be the *debt of the party* whose personal estate is to be charged in relief of the realty. A person, seised of an estate subject to a mortgage created by himself, devised all his real and personal estate to his wife absolutely, and appointed her executrix. The residuary personalty was sufficient to discharge the mortgage, which was not, however, discharged by the widow, who died intestate, leaving her brother her heir at law. The defendants were administrators of the effects of the husband, and also of the effects of the wife; and the brother filed his bill against them to be indemnified against the mortgage out of the personal estate of the husband. The vice-chancellor refused the claim, on the ground that though the residuary personalty of the husband had become the property of the wife, yet the debt of the husband not having become *her debt*, her heir at law had no claim to be indemnified out of *her* personal estate against the debt of another.

*Scott v. Beecher*, 5 Madd. 96.]

So, if an heir has lands descended to him, encumbered with a mortgage, and he, before any application made by him to have aid of the personal estate, disposes of them, he cannot afterwards come upon the personal estate; for the equity, which an heir has, is, that the lands may descend clear to the family.

*Abr. Eq.* 270, *Wood v. Fenwick*.

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[Where the real estate is originally, or afterwards becomes *primarily* liable, the real estate shall be first applied, though a *covenant* is added, or a *bond* given; for such covenant or bond is only intended as a collateral security to the land, and cannot alter the fund. In *Bagot v. Oughton*, 1 P. Wms. 347, land descended to the wife subject to a mortgage made by her father; on an assignment of the mortgage, the husband covenanted for the payment of the money to the assignee: it was decreed, that the husband's personal estate was not liable to exonerate the mortgaged premises, for the debt was *originally* the father's, and *continuing* to be so, the covenant was an *additional* security for the satisfaction only of the lender, and not intended to alter the *nature* of the debt.

George Evelyn, the father, and grandfather to the two plaintiffs, had three sons, John, George, and the plaintiff, Edward Evelyn; George, the father, (being tenant for life, remainder to his eldest son John, in tail male of part of the premises,) together with his eldest son John, on the 20th October, 1698, by deed and recovery, settled certain estates in strict settlement, with a power to George the father, by deed or will, to charge by lease, mortgage, or otherwise, the premises limited to himself for life, with raising or paying any sum not exceeding 6000*l.* George, the father, in pursuance of the power, mortgaged part of the said land for 1000*l.* for the term of 1000 years. This mortgage afterwards, by mesne assignments, became vested in Sir Thomas Pope Blunt, with a covenant, from George Evelyn, the son, for payment of the mortgage-money; and, on the same assignment, Sir Thomas, the mortgagee, covenanted to re-assign to George Evelyn, the son. Afterwards George Evelyn, the father, died; then John Evelyn, the eldest son, died without issue, upon which George, the second son, entered upon the premises comprised in the settlement, and died intestate, leaving the defendant, Mary, his widow, and three daughters. Then Edward Evelyn and his son (the next remainder-man in tail) instituted a suit against Mrs. Evelyn, the mother, (afterwards married to Governor Bohun,) being the administratrix of her former husband, George Evelyn, praying, that the personal estate of her late husband should be applied towards paying off the mortgage of 1500*l.* and in exoneration of the real estate. But it was held by the Lord Chancellor, assisted by the Lord Chief Justice Raymond, and the Master of the Rolls, that the personal estate of the son should not be applied to pay off this mortgage, made by the father; because the charge was made by the father in pursuance of the power contained in the settlement; and as he had such power, the plaintiff Edward must be contented to take such land *cum onere*; and notwithstanding that the son did afterwards, on the assignment to Sir Thomas Blunt, covenant to pay the mortgage-money, yet, since the land was the original debtor, this covenant from the son would be considered *only* as a security for the land.

*Evelyn v. Evelyn*, 2 P. Wms. 659; Fitzg. 131; S. C. Sel. Ca. Ch. 80. || Edward Evelyn and his son were *plaintiffs* in this bill, and *defendants* in another suit heard at the same time, and included in the Report in P. Wms. || Vide also *Lechmere v. Charlton*, 15 Ves. 193. ||

Gilbert, the late Earl of Coventry, on his marriage with the daughter of Sir Strensham Masters, (the earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500*l.* *per annum*, on any wife he should marry,) covenanted in consideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwise, settle 500*l.* *per annum* on his

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wife for her jointure; and it being in proof, that the late earl directed his steward to look over the rent-rolls, for a fit part of the estate to make good the jointure, and that afterwards the jointure-deed was engrossed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* should be settled, and the covenant not made good out of the *personal estate*.

Earl and Countess of Coventry, 2 P. Wms. 222, Strange, 596, S. C.

And so in the case of Edwards and Freeman, though the wife's jointure and the daughter's portion were secured by articles, which were never completed by a settlement, yet those articles being to settle lands, and the covenantor leaving lands sufficient to answer them, it was decreed, that the daughter's portion should be raised out of the lands, and that the personal estate of Mr. Freeman, the covenantor, should not be applied in exoneration thereof. But it is to be observed, that in the latter case particular lands were agreed to be settled, and, consequently, that the covenant was a lien upon those lands.

Freeman v. Edwards, 2 Will. 435.

The son, tenant in fee, on an assignment of the ancestor's mortgage, covenanted with the assignee for payment; yet it was determined, that the personal security was only *auxiliary*, and both principal and interest were charged *primarily* on the land; for although the interest had accrued during the possession of the son, the interest must follow the principal, and be charged on the same fund.

Leman v. Newnham, 1 Ves. 51. So, Lacam v. Mertins, Ibid. 312; Robinson v. Gee, Ibid. 251.

A purchased an estate for 90*l.*, which was at that time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor; the court admitted the rule of law above mentioned, but, in this particular case, thought that, although the covenant was with the vendor only, and the vendee's personal estate not liable in that respect to the mortgagee, yet the words were sufficiently strong to show an intention in the vendee to make it his personal debt.

Parsons v. Freeman, before Lord Hardwicke, 25th Oct. 1751. Vide 2 P. Wms. 664, note 1.

N was, before her marriage, indebted to sundry persons, and entitled to the inheritance of lands, charged with the payment of sundry sums; and before her marriage entered into articles, whereby the estates were to be settled to the husband for life, *sans* waste, remainder in like manner to wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband being pressed for payment of the wife's debts, and having also occasion for a farther sum of money, they borrowed 1300*l.* of the wife's sister (the original plaintiff in the cause,) and secured it by mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisos in the mortgage. Subject to this mortgage, the lands were settled on the husband for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. N died without issue; and the plaintiff was the devisee of the sister, who brought his bill against N's husband for the payment of the mortgage-money. But the Lord Chancellor held, that although part of the money was raised for the husband's use, yet the mortgage being a single

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transaction, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his lordship dismissed the bill, so far as it sought to compel the husband to exonerate the land, but directed him to keep down the interest during his life.

*Lewis v. Nangle*, before Lord Hardwicke, 7th Nov. 1752. Vide 2 P. Wms. 664, note 1; [1 Cox, 240; Amb. 150; and *Pitt v. Pitt*, 1 Turner's R. 180.]

L had purchased several estates, subject to mortgages, with regard to one of which he entered into a covenant to pay the mortgage-money, for the purpose of indemnifying a trustee; and as to another, which was only part of an estate subject to a mortgage, upon splitting the encumbrance, both parties covenanted to pay their respective shares, and indemnify each other; Lord Hardwicke thought that these covenants would not have the effect of making the mortgages personal debts of the vendee, they having been entered into for particular purposes, and declared his opinion accordingly in the decree.

*Forrester v. Leigh*, 23d, 25th June, 1773. Vide 2 P. Wms. 664, note 1.

Sir W O, by his will of the 5th February, 1739, taking notice that his daughter C was deaf and dumb, and that B had taken care of her, devised certain real and personal estate to J B, her heirs, executors, and administrators, in trust, by sale, or selling timber to pay all his debts, and directed that J B should receive the rents and produce of his real and personal estate without account, during his daughter's life, she maintaining his daughter; and after the death of his daughter, he gave all his real and personal estate whatsoever to J B in fee, and appointed her sole executrix; Sir W O died, March, 1740, and J B proved the will; Sir W O, in his lifetime, mortgaged part of his estate, for securing 1500*l.* and interest, which remained a charge at his death. J B paid off 500*l.* part of this 1500*l.*, and afterwards borrowed a farther sum of 2500*l.* on mortgage of the estates, which money was, in the mortgage-deed, expressly recited to have been borrowed to enable her to discharge Sir W O's debts. J B afterwards died, and on the disposition made by her, and those claiming under her, of the property of Sir W O, this cause was instituted. The cause was first heard before Lord Bathurst, on the 19th February, 1777, when the court declared, that the sum of 1500*l.*, part of the 3500*l.*, was not to be considered as a debt of the said J B, but was to remain a charge on the real estate, and directed an account of her personal estate. By an order made on re-hearing, on the 13th of August, 1781, that part of the decree was reversed, and, instead thereof, it was declared, that the said sum of 1500*l.* appearing to have been a charge made on the estate of the said Sir W O in his lifetime, and remaining such at his death, was to be considered as a continued lien thereon; and that the subsequent charge made on the estate by the said J B, being expressed in the mortgage-deed to have been made for the purpose aforesaid, the same together with 1500*l.* amounting in the whole to the sum of 3500*l.*, was to be considered as remaining a charge on the said estates.

*Perkins v. Baynton*, 2 P. Wms. 664, note 1.

G D mortgaged lands to W G, to secure payment of 5000*l.* with interest, at 5 *per cent.*; and by will, of 22d of May, 1723, devised the lands to his nephew G, in tail-male, remainder to the plaintiff in tail-male, remainder over, and died in the same month. In 1725, G S suffered a recovery to himself in fee. The mortgagee calling for his money, W G agreed to ad-



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vance 5000*l.* at 4 *per cent.* on assignment of the mortgage, which accordingly, by indenture of 4th of June, 1725, was assigned to him, with proviso for redemption on payment of the principal and interest at 4 *per cent.*; and G S, for himself, his heirs, executors, and administrators, covenanted with W G, that he, his heirs, &c., or some or one of them, would pay to W G the said principal and interest, in manner therein mentioned. In 1779, G S agreed to raise the interest to 5 *per cent.*, and by deed covenanted with the mortgagees, that the estate should remain a security for the 5000*l.*, with interest at 5 *per cent.*, and that he, his executors, &c., would pay such interest for the same. In January, 1782, G S died, the interest on the mortgage being in arrear for about ten months; and the bill was brought (amongst other things) to have the 5000*l.* and interest paid out of the personal estate of G, or at least the arrear of interest due at his death, and the additional 1 *per cent.* charged by the deed of 1779; but the Lord Chancellor was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. His lordship also thought that the interest must follow the principal, and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge.

Shafto v. Shafto, before Lord Thurlow, Feb. 1786, 2 P. Wms. 664, n. 1; 11 Cox, R. 207. || So, Earl of Tankerville v. Fawcett, 2 Br. Ch. R. 57.

A real estate charged with a sum of 200*l.* as a bounty was holden to be *primarily* liable, though the personal estate was also subjected by the covenant of the donor.

Wilson v. Earl of Darlington, at the Rolls, Feb. 1785, 2 Cox's P. Wms. 664, n.; 11 Cox, R. 174. ||

A leasehold estate had been mortgaged by the testator's father to N, for 6500*l.*, and had, subject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was assigned by the desire of the testator to H, who advanced him a farther sum of 100*l.* upon it, and the testator conveyed other estates as an additional security to the mortgagee. The testator then made his will, and thereby devised as follows:—"I give and devise to A and B, their executors, administrators, and assigns, all those my manors, lands, &c. in L, to have and to hold to them, from the time of my decease, for the term of 99 years, upon the trusts hereinafter mentioned." He then gave the real estate subject to the term, and, in default of issue of his own body, to the plaintiff for life, remainder to his first and other sons, in strict settlement, with remainders over, and afterwards declared as follows:—"I do hereby declare, that the term and estate, so as aforesaid limited to them the said A and B, &c., is upon the special trust and confidence, and to the intents and purposes following; that is to say, upon trust, that they the said A and B, &c. shall, out of the rents and profits, or by mortgage, assignment, or demise, of all or any part of my before mentioned manors, &c., or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to *pay and satisfy all the debts I shall owe at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs, &c., the said term shall cease and determine." He then devised as follows:—"I give and devise to my brother

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M B, his executors and administrators, all that the manor of East and West Deeping, holden by lease from the crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon to N, for 6500*l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations of this my will." And towards the end of his will he devised as follows:—"Item, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever, unto my said brother M B, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will," &c. M B died in the lifetime of the testator, and the plaintiff became entitled under the limitations in the will to the real estate. And one question was, Whether the term bequeathed by the testator for payment of debts was liable to the mortgage debt on the leasehold estate? *Et per curiam*, with respect to the leasehold estate, *the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate*, and the estate itself was left liable to answer it, and neither the personal estate, nor real estate, ought to be charged with that debt; for when a man purchaseth an equity of redemption, *subject to encumbrances*, that should be a real encumbrance following the land, and *not a personal one*. And the difference between an estate descended and one purchased was nothing, unless the circumstance of purchasing created the difference, but *that* afforded no argument. The question then was, Whether assigning the mortgage from N to H, and covenanting for payment of debts, altered the case, and made it the debt of the testator? and it was clear that it did not; for although where a man transferred a mortgage, and *covenanted for the payment* of the debt, according to the *rule of law*, he made it his *own* debt, and made *himself* liable to be sued upon that covenant; yet the case of Evelyn v. Evelyn, *infra*, had decided, that though he might be at law liable, yet, while there were *real assets* sufficient for the *payment* of the encumbrance, *they* should be applied for *that purpose*; and it was to be understood, with respect to such transaction, that the party did it by way of *accommodating the charge*, and not of making the debt *his own*.

Duke of Ancaster v. Mayor, 1 Br. Ch. Rep. 454; [and see 1 Mer. 223.]

Another question in the preceding case was, Whether, when the testator mortgaged an estate *of his own* as an *ulterior* security, that circumstance would create a difference? and it was held that it would not; for nothing made it his debt so effectually as the covenant to pay, for it did not create the debt, but only operated as collateral to the debt. A man mortgaged his estate without covenant, yet, because the money was borrowed, the mortgagee became a simple contract creditor, and in that case the mortgage was a collateral security; and if there were a *bond* or a *covenant*, then there was a *collateral* security of a *higher species*, but no higher by means of the mortgage merely; therefore having security amounted to nothing.

¶If one seized of White Acre and Black Acre mortgage the former, and then by will charge all his real estates with payment of his debts, and devise White Acre to A, and Black Acre to B, the devisee of the former shall compel the devisee of the latter to contribute.(a) On the like principle, if

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both estates had been comprised in the mortgage, and had been devised to different persons, they should have contributed.(b) The same would be the case if the estates in mortgage were freehold and copyhold, and descended to different heirs;(c) and if the estates be of equal value they will contribute equally.(d)

(a) *Carter v. Barnardiston*, 1 P. Wms.' 506. (b) *Aldrich v. Cooper*, 8 Ves. 390. (c) *Ibid.*, and see *Gwynne v. Edwards*, 2 Russell, R. 289. (d) *Ibid.*, and see *Henningham v. Henningham*, 2 Vern. 355; 1 Eq. Ca. Abr. 117.

Where the purchaser of an estate A, in order to secure the purchase-money, executed a deed of mortgage of an estate B, by the latter part of which the estate A was also mortgaged as a further and collateral security, and the two estates afterwards came to different persons deriving title from the purchaser, it was held that the estate B was the primary security, and that estate A could not be resorted to till estate B was exhausted

*Marquis of Bute v. Cunyngham*, 2 Russell, R. 275.¶

Where L being seised in fee by *descent* of an estate at C, and other real estates both freehold and copyhold, by his will devised the estate at C, which was subject to a mortgage for 1500*l.* contracted by his ancestor, and also another estate, to be sold; and charged the same, and also his personal estate, (except 300*l.* due on bond, which was originally part of his wife's fortune, and specifically bequeathed to her by the will,) with his debts and legacies, and devised the residue of his real estate in trust for his brother B, in strict settlement, subject to a charge of 100*l.* a year to his wife upon the copyhold estate; and made his wife executrix: the question was, Whether, under this will, the personal estate of the testator should be applied in exoneration of the real, towards the discharge of the 1500*l.*? And it was held by Lord Thurlow that it should not; but that the same should come out of the estate originally liable to it. And this decree was afterwards affirmed in the House of Lords.

*Lawson v. Hudson*, 1 Br. Ch. Rep. 58. Vide 7 Bro. Par. Ca. 511, [(fo. edit.); 3 *Ibid.* 424, (8vo. edit.); and see *Butler v. Butler*, 5 Ves. 534.¶

¶So, where one Johannes Worsfold was devisee of the residue of his father's real estate, subject to the payment of his debts and certain legacies, and amongst others, a legacy to his sister Elizabeth Rozier; and he also took all his father's personalty, and was appointed his sole executor. Johannes Worsfold, by his will, dated 13th February, 1761, devised an estate called A, part of the estate of which he was seised in fee under his father's will, to his said sister for life, with remainder to her sons and their heirs, and appointed his sister and E H executors. On the 15th of May, 1761, he executed a mortgage of the estate of A, for securing the legacy to his sister, and covenanted in the deed for payment of the money. By a codicil of the 5th August, 1761, he, amongst other things, gave his estate in D to his executors and their heirs, upon trust to sell for payment of all his debts, of what nature and kind soever, and legacies and funeral expenses, expressing his apprehension that his personal estate would not be sufficient. Elizabeth Rozier survived Johannes Worsfold, and filed her bill to have the estate of A, which she took as devisee of her brother, exonerated by his personal estate from her legacy under the father's will. But the Lord Chancellor decided that the legacy never became the personal debt of J. Worsfold, and dismissed the bill with costs.

*Hamilton v. Worley*, 2 Ves. jun. 62.¶

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[M D, by will of 15th of January, 1746, devised estates to trustees for a term of five hundred years, to raise money for payment of his debts and legacies, in aid of his personal estate; and, subject to the term, he devised the estate in strict settlement with the ultimate limitation to his own right heirs, and he gave the residue of his personal estate to his executrix C P. The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 1000*l.*, and then died; whilst the limitations in strict settlement subsisted, and after the death of C P, her representative filed a bill to have a debt due to C P, and her legacy, raised; and the only person then entitled under the limitation in strict settlement dying pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against M D and M D P, the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of there presentative of C P, at 2070*l.*, and gave their joint and several bond for that sum; this demand was afterwards assigned to A B, who also bought in debts to the amount of 3270*l.* remaining due from the testator M D, and the co-heirs gave another joint and several bond to A B, for this sum also; so that A B became the sole creditor on the estate. M D, being dead, and a bill being filed by A B, for payment of these sums of money, the question was, Whether a moiety thereof should be raised in the first place out of the personal estate of M D, or out of the real? and his honour was of opinion, that the real estate was the original debtor, and ought to bear the burden.

Basset v. Percival, 21st July, 1786, note (a), 2 P. Wms. 665;] [1 Cox, R. 268.]

[[Where the debt is admitted to be the debt of the party, the general rule is, that the personal estate is the primary fund for its discharge. The burden may, however, be thrown on the real estate by a clear manifestation of such intention in a testator's will. The cases on this subject are very numerous: and it has been observed by Lord Eldon in a late case, (*Boote v. Blundell*, 1 Meriv. 219,) "that, on a comparison of the cases, it is scarcely possible to find any two in which the court altogether agrees with itself." It was formerly held, that if the loan were clearly the debt of the party, nothing short of an *express declaration* of intention would exonerate the personal estate from being the primary fund for its discharge; and Lord Eldon and Sir William Grant have both regretted that this rule was ever departed from. It is now, however, decided, that the intention may be evinced not only by express declaration, but also by *plain implication*, sufficient to satisfy the mind of the judge deciding upon the case. The intention is to be collected from the whole will taken together, and evidence *dehors* the will, though admitted in some earlier cases, is now held to be inadmissible. The intention manifested must be not merely to *charge the real estate*, whether by a trust for sale or otherwise, but also to *exempt the personal estate*. As the inference of intention is to be drawn from the facts of each particular case, it is impossible to lay down any general rules as to the expressions which will or will not be sufficient to express the intention one way or the other. Certain dispositions have, however, been held unfavourable to the claim of exemption; such as the same persons being appointed trustees of the real estate and executors; a gift of the personalty to an executor as a legacy, and his appointment of executor in the same sentence; and still more the circumstance of the personalty falling to the executor *virtute officii*; a bequest of the *residue* of the personal estate, except where preceded by previous bequests of the personal estate; and the circumstance of the real estate being limited

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in strict settlement and accruing to the same person as the personalty. So, on the other hand, the circumstance of the trustees not being executors, and of a gift of the *whole personalty*, have been held favourable to the inference of an intention to exempt the personal estate from payment of debts. The presumption, however, arising from all or any of these circumstances, is open to be rebutted by opposite presumptions arising from the general contents of the whole will.

Bamfield v. Windham, Prec. Ch. 101; Stapleton v. Colville, For. 202; Inchiquin v. French, 1 Cox, 1; Ambl. 33; 1 Wilson, 83; Andrews v. Emmet, 2 Bro. C. C. 303; Dolman v. Smith, Prec. Ch. 456; French v. Chichester, 2 Vern. 568; Haslewood v. Pope, 3 P. Wms. 325; Fereyes v. Robinson, Bunb. 302; Walker v. Jackson, 2 Atk. 625; Bridgeman v. Dove, 3 Atk. 202; Samwell v. Wake, 1 Bro. C. C. 149; Gray v. Minnethorpe, 3 Ves. jun. 106; Burton v. Knowlton, Ibid. 107; Brummel v. Prothero, Ibid. 111; Tait v. Lord Northwick, 4 Ves. jun. 816; Hartley v. Hurlle, 5 Ves. 540; Brydges v. Phillips, 6 Ves. 567; Howe v. Lord Dartmouth, 7 Ves. 149; Watson v. Brickwood, 9 Ves. 447; Hancock v. Abbey, 11 Ves. 179; Tower v. Lord Rous, 18 Ves. 139; Aldridge v. Lord Wallscourt, 1 Ball. & B. 312; Bootle v. Blundell, 1 Meriv. 193; 19 Ves. 494; McClellan v. Shaw, 2 Scho. & Lef. 538; Gittins v. Steele, 1 Swanst. 28; Greene v. Greene, 4 Madd. 148; *et vide ante*, tit. *Executors and Administrators*.]

If one devise lands which are in mortgage to A for life, remainder to B in fee: A shall contribute one-third towards the discharge of the mortgage, and B the other two-thirds.

[Cornish v. Mew, 1 Ch. Ca. 271; Rowel v. Walley, 1 Ch. Rep. 221; Ballet v. Spranger, Prec. Ch. 62; Verney v. Verney, 1 Ves. 428.]

||But this doctrine is now altered, and the rule now is, that the tenant for life shall only be compelled to keep down the interest during his life; for the whole charge is upon the whole inheritance, and the natural division is, that he who has the *corpus* shall take the burden, and he who has only the fruit shall pay to the extent of the fruit of that debt.

White v. White, 9 Ves. 560. Vide Lord Penrhyn v. Hughes, 5 Ves. 99. || *β Cogswell v. Cogswell*, 2 Edw. 231. See *Estate for Life and Occupancy*, (D), vol. iii. p. 452.*g*

[And if the mortgage-money is payable on a contingency not arrived, he in remainder or reversion may exhibit his bill *quia timet*, against the tenant for life, and the tenant for life shall be decreed to contribute.

Hayes v. Hayes, 1 Ch. Ca. 223.

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term assigned over in trust for himself, and makes improvements, and dies; and afterwards the remainder-man or reversioner comes to redeem; the representatives of tenant for life shall have the allowance of two-thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life; and no interest shall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the interest during his estate.

Newling v. Abbot, East, 1 Geo. 2 Eq. Ca. Abr. 596, 11; [refers to Vin. Abr., but the editor finds no case of this name in that book.]

In the case of James and Hailes, it is laid down that, if an estate in mortgage be settled on A for life, and then on B in tail or in fee, the tenant for life shall bear two-fifths of the principal and interest, and the remainder-man three-fifths.

James v. Hailes, Prec. Ch. 44; ||*sed vide* 9 Ves. 560; 5 Ves. 99.]

But where he who is possessed of the equity of redemption hath such an

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interest in the estate, as he can secure the money laid out by him to redeem upon, the remainder-man shall pay him, or his representatives, *all* he hath advanced. As, where a *tenant in tail* of a mortgaged estate, under the will of his father, upon the death of his two brothers, paid off a debt originally on the estate by mortgage term for years, but neglected to have an assignment of the term to himself, and afterwards devised the same lands; and the plaintiffs, the remainder-men under the will, claimed the estate, as not barred, discharged of the encumbrance; the Lord Chancellor held, that there being a term for years in the mortgagee, which stood in point of law as it did before, no assignment in law being made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiffs came; and therefore *that conveyance must be upon equitable grounds*. That so far as it appeared, tenant in tail paid it off with his own money; that he might have taken an assignment of the term, either in trust, to attend the inheritance, which would have ended this question, or in trust for himself, his executors, or administrators, which would, notwithstanding the remainder over, have kept this encumbrance on foot for the benefit of his personal estate and those entitled thereto; or, that he might have called for an assignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not of the remainder*; but his not doing any of these clearly proved that he took himself to have had the absolute ownership and disposal of it. And the court could not decree, to persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of this term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, *that he who would have equity, must do equity*; and the plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail in discharge of the mortgage.

*Kirkham v. Smith*, 1 Ves. 258.]

But, if lands in mortgage are devised to A for life, remainder to B in fee, and A takes an assignment of this mortgage in a trustee's name; though B might have compelled A to contribute one-third towards payment of the mortgage, in respect of his estate for life, yet if A be dead, and the bill be brought against his executor, he shall be obliged to contribute only in proportion to the time that A, his testator, enjoyed it.

*Vern. 404; Clay v. Battison.*

{ This rule calling upon the tenant for life to pay a gross sum, part of the capital of encumbrances, is now completely put an end to. But he takes subject to all the interest which accrued prior to his estate, and must keep down the interest during its continuance. If he does not apply the rents and profits in reduction of the mortgage, though, as between the mortgagee and the estate, the mortgagee would have a right to be paid out of the estate, into whosoever hands it might come, yet the reversioner might file a bill to make the rents amenable, and compel the tenant for life to answer for what had accrued.

5 Ves. J. 106, 107, by the Master of the Rolls, in *Lord Penrhyn v. Hughes*; and see 4 Ves. J. 24, 33; 9 Ves. J. 554, 560; *White v. White*, 2 Bro. C. C. 128; *Tracey v. Lady Hereford*.

And if the mortgagee permit the tenant for life to run in arrear for the interest, and then purchase the estate for life, and take possession under

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that purchase, he is bound to apply the surplus rents and profits beyond the current interest to the discharge of those arrears.

5 Ves. J. 99, Lord Penrhyn v. Hughes.

Lands under mortgages are devised to several persons for life and in strict settlement, and the deviser directs that the mortgages shall not be discharged out of his personal estate, but shall remain charged upon the estates respectively until discharged by the several tenants for life, to whom the estates were respectively limited. All the rents and profits during the estates for life are to be applied to the discharge of the mortgages, principal as well as interest.

8 Ves. J. 295, Milnes v. Slater.}

A mortgaged his lands upon condition, that if he or his heirs repaid 100*l.* at such a day, he should re-enter; before the day he dies, leaving issue a daughter, his wife *enfeint* with a son; the daughter pays the money at the day, and then the son is born; the daughter shall keep the lands, and the son shall not recover against her; for the daughter is in nature of a purchaser, where she hath regained the land by her own vigilance, which otherwise had lapsed at law to the mortgagee.

Cro. Car. 87; Co. 99.

[If one purchase an estate subject to a mortgage, his personal estate will not be liable to exonerate the real estate from payment of the mortgage-debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all costs and charges in respect of it. Thus, A agreed to purchase an estate of B, which was then subject to a mortgage of 2000*l.* to D; and accordingly, by indenture of lease and release between A of the one part, and B of the other part, reciting the mortgage, and that B had contracted with A for the purchase of the inheritance of the said estate, and had agreed to pay the sum of 3500*l.* for the same in manner therein mentioned; that was to say, to the mortgagee all such sums as should be due to him upon the said mortgage on the first of May next ensuing, as also to pay such sum of money as should remain after deducting the money due to the mortgage of D; it was witnessed that the said A, in consideration thereof, did grant, &c., to the said B, his heirs and assigns for ever, all the said premises, &c.; and in the covenant against encumbrances, the mortgages and securities were excepted. And the said B did covenant, that he, &c., would well and truly pay, or cause to be paid, to the said D, the said sum due in manner aforesaid, and would indemnify the said A, his heirs, &c., and his goods and chattels, land and tenements, from all costs and charges, &c., in respect of the said mortgage. A, after completing the purchase of B, made his will and died, and then a question arose between his personal representatives and the devisees of this estate under the will, Whether, from the nature of the contract, the personal estate of A (respecting which he had made no disposition in his will) was liable to be applied in discharge of the mortgage? *Et per curiam*, it is a clear rule that the personal estate is never charged *in equity* where it is not a law; and if not chargeable at law, there is no principle or case in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims. In respect of the rule of marshalling assets, it is that it must be a debt affecting both the real and personal

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estate ; so in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove that the executors are accountable at law, and not in equity. In this case, the personal estate never was liable, either by action against the party himself, or against his executors.

Tweddel v. Tweddel, 2 Br. Ch. Rep. 101 ; ] *Butler v. Butler*, 5 Ves. 534.]

§ If a purchaser or devisee of land encumbered, renders himself personally liable to the creditor for payment, the land, as far as relates to the marshalling of assets, is the primary fund for payment, unless a contrary intent be clearly shown.

*Duke of Cumberland v. Codrington*, 3 Johns. Ch. R. 252.

If an estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old debt, and also one contracted by himself, and fixes a new day of payment, he makes himself liable to both, notwithstanding he exempts, in the new mortgage, his person and his property, except what is comprised in such new mortgage, from liability in respect of the debts.

*Lushington v. Sewell*, 1 Sim. 435.

A mortgagee had notice of several successive alienations of parts of the mortgaged premises, and released that part which was primarily liable in equity for the payment of the mortgaged debt ; held, that he could not be allowed to charge other portions of the premises with the payment of the mortgage, without deducting, from the amount due, the value of the part thus released.

*Guion v. Knapp*, 6 Paige, 35.

If a mortgagor sell a portion of the equity of redemption for a valuable consideration, the entire residue is applicable in the first instance to the discharge of the mortgage in case of the *bona fide* purchaser ; and a subsequent purchaser from the mortgagor cannot be in a better condition than the mortgagor himself.

*Hartley v. O'Flaherty*, Lloyd & G. temp. Plunk. 216.

Although the mortgagee has contracted to buy from the mortgagor another estate, from the purchase-money for which the mortgage debt is to be deducted, yet he cannot be restrained from enforcing his security at law.

*Pell v. Stevens*, 1 Coop. temp. Brough. 266.

Where the estates under several mortgages were ordered by the court to be sold, and the proceeds paid into court, forming one general fund, the costs of the mortgages ordered to be paid according to their priority : the mortgagor having two estates mortgaged, both to B, then one to C, and afterwards both again to B, to secure further advances, and lastly, both to D, the several encumbrancers having notice of the prior charges ; the estates proved insufficient to satisfy all, but one was sufficient to pay in full ; the court, as between C and D, refused to marshal the securities by directing B to receive full payment out of such sufficient estate, leaving C the first encumbrancer, but directing that B should come in rateably on both estates.

*Barnes v. Raester*, 1 Yo. & Cr. N. S. 401. g

¶ Although in general a mere covenant by the purchaser with the vendor to pay the mortgage debt is not sufficient to indicate an intention to make the debt his own, so as to throw the burden on the personal estate, yet that, joined with other special circumstances, has been held to have that effect.



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Richard Huntingford and Alice his wife being tenants for life, with remainder to their eldest son John, in fee of certain lands, they all joined in mortgaging them for securing money raised for the benefit of John alone. The father and son covenanted for payment of the money; a further sum was afterwards advanced, for payment of which they also covenanted, and thus both became liable to an action at law for the money. The interest being greatly in arrear, and John being desirous of being discharged from the debt, conveyed his remainder in fee to Richard, in consideration of Richard taking upon himself the debt, and covenanting to indemnify John therefrom. Richard afterwards borrowed a further sum, and made a fresh mortgage of the estate for the whole sum. The Master of the Rolls thought this case distinguished from *Tweddell v. Tweddell*, and relying principally on the circumstance of the father's being liable *at law* jointly with the son, and on the new mortgage by the father for the whole debt, decided that Richard H. had made the debt his own, and consequently that his personal estate was the primary fund for the discharge of it.

*Woods v. Huntingford*, 3 Ves. jun. 128.

So, also, if a purchaser *borrow* a sum of money to enable him to complete his contract, and the estate is on the purchase limited to the lender by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate is primarily liable, though a part of the money borrowed be applied in discharge of an existing mortgage. An estate was sold by order of the Court of Chancery to Mr. Waring for 32,500*l.* The estate was in mortgage for 17,800*l.* The purchaser paid 12,500*l.* into court, and borrowed 20,000*l.* from Sir R. Cunliffe, which was also paid into court; and all parties concurred in a conveyance to Sir R. Cunliffe in fee, subject to redemption by Waring, on payment of 20,000*l.* and interest. It was contended that the land was the primary fund for payment of the money borrowed, or at least of so much of it as was applied to discharge the original mortgage. But the court decided that the whole debt was the debt of Waring, that the transaction was a personal contract between him and Cunliffe, and consequently that the money was to be paid out of the personal estate.

*Waring v. Ward*, 5 Ves. 671; 7 Ves. 332.

So, in a case where one Nicholl, being possessed of the equity of redemption of a house, sold the equity of redemption to Lord Oxford, in consideration of 1360*l.*, subject to a mortgage of 2100*l.* to Mr. Wilbraham. Wilbraham was a party to the conveyance, and covenanted that if Lord Oxford paid the 2100*l.*, with interest, on certain days and in certain proportions, *mentioned in the purchase-deed*, he would re-assign the premises; and Lord Oxford covenanted that he would pay the debt accordingly. It was held that Lord Oxford's personal estate was the primary fund.

*Earl of Oxford v. Lady Rodney*, 14 Ves. 417. Vide also 2 Eden, R. 162.]

[Sir John Napier's estate was in mortgage, and he died, leaving Sir Theophilus his heir, who, upon his intermarriage with Lady Effingham, settled a jointure upon her, and covenanted to pay his father's debts, and then died, possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of parliament, in trust to pay his father's debt: the heir at law brought his bill against the wife, to have the personal estate of the husband, upon his covenant, applied to discharge the father's mortgages, and it was so decreed.

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But the reason was, because the heir had disposed of the estate so settled in trust, and then it was but just and equitable that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law, because he was answerable for the trust estate, settled for that purpose.

*Napier v. Lady Effingham*, Fitzg. 142, 144; ] [S. C. 2 P. Wms. 401; 5 Bro. P. C. 231, *nom.* *Effingham v. Napier*.]

If a man enter into a bond, in which he binds himself and his heirs, and dies, leaving a real estate to descend to his heir, subject to a mortgage for years, and the heir sells the equity of redemption, the obligee cannot redeem the mortgage, without first having a judgment at law against the heir.

*Abr. Eq. 315, Bateman v. Bateman*, [1 Atk. 421.] § Where a man gives a bond and mortgage for his own debt, the mortgage is merely a collateral security. *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 252. §

A dowress may redeem a mortgage, paying her proportion of the mortgage-money; and as to the rest, she may hold over till she is satisfied.

*Abr. Eq. 219, Palmes v. Danby*; [Prec. Chan. 137; and see *Powell*, 681, note (F).]

So, if a jointure is made of lands which are mortgaged, the wife may redeem, and her executor shall hold over till repaid with interest; because such tenant for life ought to be reimbursed the money she paid to set her estate free, and in the condition she ought to have been in.

*Chan. Ca. 271*; 2 *Vent. 243*; 2 *Chan. Ca. 100, 161*.

But if a jointress after marriage join with her husband in a fine, and mortgage the land, and the husband die; there, her land is charged, and she shall pay her part towards the disburdening of the land; and her executors shall not hold the land till satisfied thereof, because she herself concurred in laying on the charge, and therefore must join in the disburdening of it, according to the value of her interest.

*Chan. Ca. 271*; 2 *Chan. Ca. 99, 100*.

If the wife joins in a mortgage, and levies a fine, with an intent to bar her dower; and in consideration thereof the husband agrees that she shall have the equity of redemption in lieu of her dower, and he afterwards mortgages the same estate twice more; though this agreement be fraudulent against the subsequent mortgagees, so far as to entitle the wife to the whole equity of redemption, yet she shall have her dower, if she survives her husband, and shall not be put to her writ of dower, because the estate may be so conveyed away by some of the mortgagees that possibly she may not know against whom to bring her writ of dower.

*Vern. 294, Dolin v. Coltman*. § If the husband and wife join in making a mortgage, her right of dower can be affected only to the extent of the mortgage, and she may call on the personal representative of the husband to discharge the mortgage. *H. K. Chase's case*, 1 *Bland*, 227. §

If a man marries a jointress of houses which are burnt down, and the husband and wife borrow 1500*l.* to build on the ground, and levy a fine *sur concessit* for ninety-nine years, if the wife lives so long, and a deed is made between the conusee and the husband, wherein the husband covenants to repay the mortgage-money, with interest; and the equity of redemption is limited to the husband and his heirs, and the husband expends 3 or 4000*l.* in building on this ground, and dies; the wife shall redeem, and not the heir of the husband; for the wife was no party to the deed of re-demise, by which the redemption was limited to the husband; and the wife being a jointress, and having granted a term for years only, out of

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her estate for life, there rests a reversion in her, which naturally attracts the redemption.

Vern. 213, *Brend v. Brend*; [1 Eq. Ca. Ab. 62; Skin. 338.] [In this case, as reported by the name of *Brond v. Brond*, 2 Ch. Ca. 98; it is stated, that there was an agreement that the wife should not be prejudiced, but should redeem, paying the interest of the money borrowed, and that the court resolved, that the wife having suffered the representatives of the husband to remain in possession, and pay off his debts, without exhibiting her claim for a long period of time, should not be allowed any profits received by the husband's representatives, but from the time of filing the bill, which was the first notice to them of such agreement.]

A on his marriage agreed to leave his wife 1000*l.* if she survived him; the drawing of the agreement was left to the parson of the parish, who made a bond from A to his intended wife in 2000*l.* conditioned to leave her 1000*l.* if she survived him; the marriage was had, and A died; leaving a freehold and copyhold estate in mortgage, and which were mortgaged together; and it was held, that the wife should redeem as well the freehold as copyhold, and hold over till she was satisfied.

2 Vern. 480, *Action v. Pierce*.

A joins with B, her husband, in making a mortgage for years of her inheritance for 4500*l.* to supply the husband's occasions, and to pay for the place of captain of the band of pensioners; and subject to the mortgage, which was for a term of years, the estate was settled on A for life, remainder to her son in tail: B in the mortgage-deed covenants to pay the money, and the proviso was, that on the payment of the mortgage-money the term was to cease: the mortgage was several times assigned, and particularly in 1683, and the wife joined in it, and there the proviso was, that on payment of the money by them, or either of them, the mortgage-term was to be assigned as they, or either of them, should direct or appoint; a few days after the mortgage was made, B by letter thanked his wife for having sealed it, and added, that the profits of the office should be religiously applied to pay off the encumbrance: but afterwards, when money came in, though he paid off the mortgage, yet he took an assignment thereof in trust for himself; and by will devised his personal estate, and the benefit of this mortgage, to his second wife. On a bill by the son of the first wife, to have this mortgage assigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon the usual terms of redemption, on payment of principal, interest, and costs, discounting profits. But upon an appeal to the Lords, the son obtained a decree to have the mortgage assigned to him.(a)

2 Vern. 437, *The Earl v. The Countess of Huntington*; [Corbett v. Barker, Anst. 138, 755; *Ruscomb v. Hare*, 6 Dow. P. C. 1.] (a) 1 Br. P. C. 1.

The general principle of equity is, that if money be borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption is by the mortgage-deed reserved to the husband and his heirs, yet there shall be a resulting trust for the benefit of the wife and her heirs, and the wife or her heir shall redeem, and not the heir of the husband. But if a clear intention appears on the face of the mortgage-deed, to give the equity to the husband and his heirs, in that case the husband or his heir shall redeem; and this intention may be collected from the *limitations*, and need not necessarily be expressed by *recitals* in the deed.

Mary Hare was devisee of her late husband's lands, subject to two mortgages for 800*l.* and 450*l.*, and also his executrix and residuary legatee.

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After his death she married Bruford, and joined with him in a conveyance, reciting those mortgages and payment of interest on them to that time by Bruford, and conveying the estates to the mortgagee, for better securing the mortgage-moneys and interest, at 5*l.* *per cent.*, (the interest before having been 4*l.* 10*s.* *per cent.*,) discharged of the former proviso for redemption, and subject to a proviso, that in case Bruford should pay the mortgage-money and interest at five *per cent.*, the mortgagee should reconvey to him, his heirs and assigns for ever. The wife died in 1794, and the husband in 1799; and the son and heir of the wife filed a bill for redemption against a vendee under the husband and the mortgagee, and also against the devisees of the husband. The Lord Chancellor decreed a redemption by the heir accordingly; and on appeal to the House of Lords, the decree was affirmed, the Lord Chancellor expressing his opinion that the *intention* of the mortgage by the husband and wife was to secure the higher rate of interest, and not to reserve the equity of redemption to the husband.

Ruscombe v. Hare, 6 Dow. P. C. 1.

By a marriage settlement, lands were settled to the use of the husband and wife successively, for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and new appointment; and the wife joined with her husband in a mortgage for a term of years, subject to redemption on payment of the money and interest, on which the term was to be void. A fine was levied according to covenant, and by the deed, to lead the uses, the lands were limited after determination of the mortgage term to the husband and wife, and survivor for life, remainder in tail special; and for default of issue, remainder to the right heirs of the survivor of husband and wife. The wife having died without issue, leaving the husband surviving, it was decided by the House of Lords, on appeal, (reversing the decree of the Court of Chancery,) that this was more than a mere mortgage transaction; that the mortgage term and the fee being kept distinct in the deed, there was on the face of the limitations an apparent intention, after the purposes of the security were satisfied, to limit the estate to fresh uses; and therefore that the heirs of the husband, and not the heirs of the wife, were entitled to redeem.

Jackson v. Innes and others, 1 Bligh, R. 104, and 16 Ves. 35; and see Powell, 678, *notd* (6th ed.)||

So, where A and his wife mortgaged the wife's estate, and A covenanted to pay the money, but the equity of redemption was reserved to them and their heirs; the husband dying, it was decreed, that the mortgage should be discharged out of the husband's estate.

2 Vern. 604, Pocock v. Lee.

- [Again, a husband, seised in right of his wife, borrowed 500*l.* to supply his occasions; for securing which, he and his wife levied a fine of her inheritance, and raised a term of five hundred years, which was limited to the person lending the money, with remainder to the wife in fee, to be void nevertheless upon payment of the money borrowed, with interest; and in the deed, the husband covenanted to pay it off. Afterwards, the husband made his will, by which he gave several charities out of his personal estate, and then died, without having discharged the mortgage, indebted by simple contract. The assets not being sufficient to pay the mortgage-money, and also the charities given by the will, the widow exhibited her bill to have the former discharged out of her husband's personal estate. And so it was

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decreed; for his personal estate would be liable to pay debts before legacies, though left to a charity, they being still but legacies.

Tate v. Austin, 1 P. Wms. 264; 2 Vern. 689, S. C.

¶But if the wife or her heir, after the husband's death, promise to relinquish her claim, the husband's estate shall be exonerated; and parol evidence is admissible of such agreement, though not admissible, as it should appear, to prove that the money was a *gift* to the husband, contrary to the express terms of the deed. The court said that where the money was intended as a *gift* to the husband, the estate might be vested by a fine in trustees upon trust, by sale or mortgage, to raise the money; in which case the debt could never be the debt of the husband, but a sum to which he would have an original right without any obligation to repay.

Clinton v. Hooper, 1 Ves. jun. 188.¶

Where a man made a voluntary deed, and afterwards mortgaged the same lands, and the *first deed*, on trial at law, was found fraudulent against the mortgagee; yet, on a bill exhibited by the person to whom the deed was made to redeem the mortgage, it was held, that, although the first deed was fraudulent, because voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would pass that; for a voluntary deed would bind the party that made it, and his heirs.

Ran v. Cartwright, 1 Ch. Ca. 59; 1 Vern. 193; Nelson, 101; Eq. Ca. Abr. 315, 1; Barthrop v. West, 2 Rep. Ch. 62.

Assignees of a bankrupt may redeem, or assign an equity of redemption.

1 Ch. Ca. 71. ¶As to bankruptcy of mortgagor, vide tit. *Bankrupt.*¶

So, likewise, a tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it; ¶and this although he be lessee of the mortgagor only, after the mortgage made.

Dougl. Rep. 22, Keech v. Hall; ¶3 Crui. Dig. 110, (2d ed.)¶

The assignee, in equity, may redeem a mortgage.

Howard v. Harris, 1 Vern. 33.

And an assignee of the equity of redemption, which has been deserted for a time, but not for that period which is a bar to a redemption, will, if there are circumstances which would induce the court to decree a redemption in favour of the mortgagor or his representative, be entitled to the benefit of it. Therefore, Lord Hardwicke, in a case where a prowling assignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very inconsiderable sum, imagining that, from some knowledge of the law, he might be able to unravel a great number of circumstances, and by that means entitle himself to a redemption, was of opinion, that he was entitled to a decree to redeem. But his lordship held him entitled only upon these terms, viz.: that the assignee, in taking the account before the master, should be confined to surcharge, and falsify only, and the interest upon the mortgage be computed at five *per cent.*, though at that period money bore a higher rate of interest.

¶Nelson, 101; 1 Eq. Ca. Abr. 315; ¶Anonymous, 3 Atk. 314.

A mortgage by a popish heir may be redeemed by the next protestant heir.

Jones v. Meredith et al., Bunb. 346; Com. Rep. 661.

An equity of redemption will follow the custom as to the legal estate. In VOL. VII.—11

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borough-english lands, if mortgaged, the equity of redemption will descend to the youngest son to whom the lands descend.

2 Ves. 304.

So, in mortgages of gavelkind, lands which descend to all the children equally, the equity of redemption descends to all likewise.

2 Ves. 304.

And it may be devised. Thus, where one, seised in fee-simple, mortgaged his lands, with a proviso for repayment by him, his heirs or assigns, and then devised the same premises, the court decreed, on a bill by the devisee to redeem, that the equity of redemption belonged to him and not to the heir.

*Phillips v. Hele*, 1 Ch. Rep. 190; et vide 2 Burr. 978.

But if a mortgagor, before the condition broken, devise, it will be void; for a condition is not devisable.

2 Chan. Ca. 8.

Every devisee of a mortgaged estate that brings a bill to redeem, need not make the heir at law party: if the devisee claims to have the will established, it is necessary; if only a title under the will, it is not.

2 Ves. 431.

A judgment-creditor may redeem against a mortgagee of a leasehold estate, who is likewise a bond creditor: but before the bill is brought to redeem, a writ of execution must be sued out; for until that be done, the judgment-creditor hath no lien on the leasehold estate, and, for want of its being taken out, the bill in the principal case was dismissed.

*Shirley v. Watts*, 3 Atk. Rep. 200; *Angel v. Draper*, 1 Vern. 399; *King v. Marissal*, cited in the principal case. [As to whether the judgment must be docketed, see *Powell*, 281 a, note.]

Tenant by *elegit*, statute-merchant, or staple, may redeem.

Bunb. 347; 2 Eq. Ca. Abr. 594, notes.

And the law is the same as to a judgment-creditor, though the judgment be with stay of execution. Thus H, in 1693, confessed a judgment, with a defeasance, by which it was not to take effect until after the death of a woman, who lived until 1726. The estate, subject to this judgment, descended in the mean time from H to his heir, who mortgaged it to T. The mortgagee had no notice of the judgment at the time: the heir afterwards, in 1721, about five years before the woman died, became bankrupt; and the mortgagee was appointed assignee. After her death, the representative of the judgment-creditor brought his bill against the assignee to redeem the mortgage, upon payment of principal, interest, and costs. The question was, Whether, as there was no actual *elegit* taken out by the judgment-creditor before the commission of bankruptcy issued, the assignee under the commission, *qua* such, or the judgment-creditor, should redeem? And it was contended on the side of the assignee, that the heir was chargeable only as *terre-tenant*; and therefore the person who claimed under the judgment was not a creditor of the bankrupt. *Sed per cur.*—The judgment-creditor is entitled to redeem the whole, (for it must be entire,) and to have the estate of H exonerated out of that of his heir, if the heir's is sufficient. As to the point which had been laboured, in order to make this person come in as a creditor under the commission of bankruptcy, there was nothing in it. If it had been merely a bond-creditor from the ancestor, there might have been some colour to insist upon this under the statute of fraudulent devises;

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because that act made it a debt against the heir himself, as well as the ancestor. But it was entirely different here, as this was a *judgment* which was a *lien* upon the land, *à fortiori* a *lien* upon the lands in the hands of the assignee under the commission, who stood only in the place of the bankrupt.

Stonehewer v. Thompson, 2 Atk. 440.

The crown may redeem estates mortgaged, forfeited by the mortgagor by his being indicted and outlawed for high treason.

Attorney-General v. Crofts, 1 Bro. P. C. 22. [Vide *dictum* of M. R. in Burgess v. Wheate, 1 Eden, R. 211.]

If an estate descend to an infant, subject to encumbrances, the guardian may, without the direction of a court of equity, apply the profits to discharge the encumbrances, viz.: to pay the interest of any real encumbrance, and the *principal* of a mortgage; because that is a *direct and immediate* charge upon the land; but *not* the principal of any other real encumbrance.

Palmes v. Danby, Prec. Ch. 137.]

{He who has the legal estate must redeem, unless a special case is made. Therefore creditors under a deed of trust cannot have a decree for redemption against a mortgagee, unless under special circumstances, as that the trustees were called upon to redeem and refused, or are colluding with the mortgagee, or are unsafe. The trustees should come and claim the benefit for them.

6 Ves. J., 573, Troughton v. Binkes.}

§ No one is entitled to redeem unless he is entitled to the estate of the mortgagor, or claims a subsisting interest under it.

Grant v. Duane, 9 Johns. 591. See Smith v. Manning's executors, 9 Mass. 492; Burnett v. Denniston, 5 Johns. Ch. 35; Franklin v. Gorham, 2 Day, 142; Dust v. Conrod, 5 Munf. 411; Skinner v. Miller, 5 Litt. 85; Bigelow v. Wilson, 1 Pick. 485; Matter of Scrugham, Hopk. 88; Tucker v. White, 2 Dev. & Batt. Eq. 289.

Upon the death of an administrator, who has mortgaged the leasehold estate of his intestate, reserving the equity of redemption to himself, his executors, administrators and assigns, the equity of redemption vests in the personal representatives of the administrators, and not in the administrator *de bonis non* of the intestate: the rule being that those persons entitled to redeem in equity are those who, within the time limited by the mortgage-deed, would have been entitled to redeem at law.

Skeffington v. Whitehurst, 3 Yo. & Call. 2.

An encumbrancer *pendente lite* is not entitled to redeem, and therefore need not be made a party to a bill of foreclosure, unless under special circumstances.

Burnett v. Denniston, 5 Johns. Ch. 35.

A judgment creditor may file a bill to redeem.

Hitt v. Holliday, 2 Litt. 332. See Van Buren v. Olmstead, 5 Paige, 9.

The executrix of the mortgagor or of his grantee, having no interest in the premises, is not entitled to redeem.

Douglass v. Sherman, 2 Paige, 358.

Husband and wife being jointly entitled to an equity of redemption in fee, conveyed it by deed, without a fine, to the mortgagee; after her husband's death, she and the heir may redeem at any time within twenty years after the husband's death.

Price v. Copner, 1 Sim. & Steu. 347.

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In a bill to foreclose a mortgage, the devisees of the land mortgaged ought to be the parties, and not the executors of the mortgagee.

Graham v. Carter, 2 Hen. & Munf. 6.

If several persons are interested in an equity of redemption of mortgaged estate, either as owners in common, or each as owner of a distinct parcel of the mortgaged premises, any one of them may redeem by paying the whole amount due on the mortgage; and the party removing the encumbrance is entitled to remuneration.

Gibson v. Crebore, 5 Pick. 146; Allen v. Clark, 17 Pick. 47; Parkman v. Welch, 19 Pick. 231.

An equity of redemption is indivisible, and cannot be apportioned among creditors; where, therefore, A, to secure a debt to B, mortgaged to him two pieces of land, by separate deeds, and C, a creditor of A, levied an execution on A's right in one of the pieces; it was held, that C was entitled to redeem both, by paying the whole purchase-money, but could not redeem the piece set off to him on execution, by paying such proportion of the whole debt as that piece bore in value to the whole mortgaged premises.

Franklin v. Gorham, 2 Day, 149.

In Connecticut, the attachment of an equity of redemption creates a lien upon the estate, in favour of the attaching creditor, which entitles him to redeem.

Lyon v. Sanford, 5 Conn. 544.

Before the time specified for the payment of the money contained in a mortgage, chancery will not, on the tender of payment of the principal of the debt and interest up to the stipulated time of payment and costs, allow the mortgagor to redeem, and enjoin against an action at law for possession of the premises, as this would be to substitute another contract for that into which the parties had entered.

Abbe v. Goodwin, 7 Conn. 377.

2. *To whom the Mortgage Money shall be paid, & and what shall be considered a Payment.*

Mortgages, being part of the personal estate, belong to the executors or administrators, though it was formerly held, that if a feoffment in fee was made upon condition, that if the mortgagor paid the sum to the mortgagee, his heirs, executors, or administrators, that then the mortgagor should re-enter, and the day passed without payment, and the mortgagee died, whereby the lands descended to his heir; in such case, the heir being named in the condition, and no bond or covenant given to make it appear a personal matter, and no deficiency of assets to pay creditors, that the heir, parting with the benefit descended to him, should have the money in the mortgage.

Chan. Ca. 88, Smith v. Smolt.

But afterwards it was truly settled by the Lord Chancellor Finch, that the money should go to the executors or administrators, and not to the heir; and the reason was, because equity follows the law. And at common law, if conditions or defeasances of mortgages are so penned, as no mention is made either of heirs or executors, in that case the money ought to be paid to the executors, because the money came out of the personal estate, and therefore ought to return thither again. But if the defeasance appoints the money to be paid to the heir or executor disjunctively, there, by the common law already mentioned, if the mortgagor pay the money precisely at the day, he



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may elect (a) to pay it either to the heir or the executor. But where the precise day is past, and the mortgage forfeited, all election is gone in law, for in law there is no redemption. And when the case is reduced to an equity of redemption, it were perfectly against equity to revive the election of the mortgagor; because that would only tend to the delay of the payment of the money as long as he pleased, and end in compositions to pay the money into that hand which would use him best. And to say that the election should be in the court, would be to place an arbitrary power in it, which would tend to the inconvenience of the subject; since no man could safely pay the money in such cases, without a suit in equity. And, therefore, since there ought to be a certain rule, a better cannot be chosen, than to come as near as can be to the rule and reason of the common law. Now the law always gives the money to the executor where no person is named, and where the election to pay either to the heir or the executor is gone and forfeited in law, it is all one as if neither heir nor executor were named in the condition. And then, in natural justice and equity, the principal right of the mortgagee is to his money, and his right to the land is only as a deposit or pledge for his money; and therefore the money ought to be paid into the proper hand, that the mortgagee hath appointed receiver of his money, and that is his executor. And then the heir, who is only a trustee to keep the pledge, ought to deliver it back to the mortgagor; for though the heir has the use and benefit of the land till redeemed, yet he has it only as a pledge, and therefore is a trustee to restore it when the money is paid to the proper hand; and the heir himself, though he be proper to keep the pledge, being land, yet he is not proper to receive the money, it being purely personal. Nor is it hard that the heir should part with the land without having the money that comes in lieu of it; because we are to consider that the money was originally parted with from the personal estate, and had immediately come into the hands of the executor, had it not been placed out on this real security. Whether, therefore, the executor has assets or not, the mortgage-money should be paid to him. But the mortgagee, by any conveyance in his lifetime, or by his last will and testament, may dispose of it otherwise to whom he pleases.

Chan. Ca. 283; 2 Chan. Ca. 50, 51, 220; 2 Vent. 248, 351; Hard. 467; Vern. 170, 412; Prec. Chan. 11. [(a) If the mortgage be in fee, conditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage forfeited, though the mortgagor has in this case his election to pay the money to either, yet it will belong to the executor. 2 Ventr. 351.]

If the heir of the mortgagee forecloses the mortgagor, the executor being no party, upon a bill by the executor against the heir of the mortgagee and the mortgagor, the land will be decreed the executor.

2 Vern. 66.

But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest.

2 Vern. 67.

And, if the mortgagor doth not redeem, the administrator shall have the land. Thus, where the mortgage was forfeited, the heir in possession by descent, no want of assets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his administrator;

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for as the money, being part of the personal estate, would have gone to him, so would the land, which was in lieu thereof.

*Ellis v. Gnavas*, 2 Ch. Ca. 50. ¶If the mortgagee devise the land by will, not executed according to the statute of frauds, *qu.* whether the devisee or executor or administrator shall have the land?—it seems the devisee; for such devise appears to be out of the statute. See *Powell*, 428, (6th ed.)

If there be a mortgage in fee of a long standing, and there be two descents cast since the mortgage was made; though the mortgagor, by answer, says he will not redeem, yet the mortgage shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released.

2 Vern. 367, *Tabor v. Grover*; 1 Eq. Ca. Ab. 328, 2 Freem. 227.]

[Although a mortgagor, the mortgage being forfeited, releases to the heir of the mortgagee in fee, yet the administrator shall have the benefit of that estate, even though there be no debts. And so it is in case a mortgage be foreclosed, or that the mortgage be of so ancient a date as in the ordinary course of the court it be not redeemable; *for, in case the mortgagee be not actually in possession, it will be looked upon to be personal estate.*

2 Vern. 193.

And, where there was a husband and wife, and the wife, having a mortgage in fee of a copyhold, died leaving issue, which issue was admitted, and died, and then the husband, as administrator to his wife, claimed title to the copyhold, being a mortgage, and so part of his wife's personal estate: it was decreed to him against the heir at law, although the latter had been admitted.

*Turner v. Crane*, 1 Vern. 170; 12 Ch. Rep. 155.]

So, a mortgage of an inheritance, to a citizen of London, hath been held to be part of his personal estate, and divided according to the custom.

1 Ch. Ca. 285; 1 Vern. 4.

But where a mortgage was devised as real estate, after a decree of foreclosure *nisi*, it was held to be personal estate for payment of debts, if assets fell short, though considered as real estate between devisor and devisee.

[*Garrett v. Evers*, Mossel. 364.] ¶See *Powell*, 423 a.]

¶But as between devisor and devisee it was decided, that a mortgage did not pass under a devise of all lands in strict settlement; although a decree for an account on a bill of foreclosure had been obtained before the date of the will; for the mortgage was considered a chattel interest until the final order of foreclosure; and, as it then became the testator's fee-simple estate, it could not pass under his antecedent will.

*Thompson v. Grant*, 4 Madd. 438.

But if the devise is made after the final decree of foreclosure, the lands *may pass*, though treated as a mortgage, if the intention appear to be so.

*Bathurst v. Schlott*, 3 Ves. & B. 49.]

¶But a mortgage will not pass as *land* under a general description, applicable to it in point of locality, if there be other circumstances sufficient to show, that the owner considered it as personal property.

*Martin v. Moulin*, 2 Burr. 969.

*When money secured by a mortgage (to which the executor was legally entitled), was articulated to be laid out in land, and settled on the issue of the*

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marriage, it was by Hale, Chief Justice, on a special verdict, adjudged to be bound by the articles.

Laurence v. Beverley, cited 3 P. Wms. 217; 11 Vern. 471; 2 Keb. 841.]

If two persons advance a sum of money on mortgage, and take the mortgage to themselves *jointly*, without inserting in the deed the words *to be equally divided between them*, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him that is dead shall have a proportion, because, from the nature of the transaction, the court presumes this to be the intention of the parties. Thus, N and S lent 2000*l.* to G on mortgage, 1450*l.* whereof was the money of S, and 550*l.*, the residue, the money of N, and it appeared, by a note under both their signatures, that the 1450*l.* was delivered by S to N, and that, if the mortgage was paid off, then the 1450*l.*, with interest thereon, was to be re-delivered into the hands of S, for the uses of his will. Afterwards, and before the day of redemption, S made his will, reciting the above memorandum, and disposed of his share thereby. The lands were redeemed on the day, and the whole money and interest paid to N, S being dead, and he claiming it by survivorship. But, on a bill exhibited by his executor, the court was clearly of opinion, that by equity there ought to be no survivorship in a case of this nature; and that the note under the hands of both the parties, and the will of S, showed plainly that there was a trust between them, *that*, on repayment, each of them was to have his money, with interest.

2 Ves. 258; 13 Ves. 631; Petty v. Styward, 1 Ch. Rep. 58; 11 Eq. Ca. Abr. 290; and see 2 Ves. 258. As to husband's interest in the wife's mortgage, vide tit. *Baron and Feme.*]

And if two persons, being mortgagees, foreclose the mortgagor, the mortgaged estate shall be divided *between* them, because their *intent* is *presumed* to have been, that it should be so divided.

2 Ves. 258.] *¶* Where there is a joint-tenancy in a mortgage, the surviving mortgagee will be held a trustee for the representatives of a deceased co-mortgagee. Randall v. Phillips, 3 Mason, 376.*g*

But if a mortgagee in fee enter for a forfeiture, and after seven years' enjoyment absolutely sell the land to J S and his heirs, the estate shall not be looked upon to be a mortgage in the hands of J S so as to make it part of his personal estate, but it shall be for the benefit of his heir.

Vern. 271; Cotton v. Iles, 11 Eq. Ca. Ab. 273, 328; Barn. Ch. Ca. 46.]

A being in possession of an estate that was a mortgage in fee, by will devises it to his daughters B and C and their heirs, and dies; B marries, and dies; the question was, Whether the share of B should be decreed real or personal estate, and, consequently, go to her heir, or to her husband as her administrator? It was decreed against the husband; and my Lord Keeper put this case: A man seised of lands in fee, which were only mortgaged to him, devises them to his son and heir, and his heirs; surely these lands shall descend as an inheritance; or, though the mortgage be paid off, shall not the money be considered as lands, and go to the heir and his heirs, as the lands would have done, and this purely by the intention of the testator? and did not the testator, who had a governing power, intend in the present case that the mortgaged lands should be considered as any other lands of inheritance, and be subject to, and be directed by, the same rules which other estates are?

Preced. Chan. 265, Noys v. Mordant; 11 Gilb. Ch. R. 2; 2 Vern. 581.]

*¶* When a mortgagee purchases or takes a release of the equity of redemp-

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tion of a part of the mortgaged premises, the mortgage is extinguished *pro tanto*.

James v. Morey, 2 Cowen, 246.

A delivery of money from a mortgagor to a mortgagee with an injunction to pay, without a receipt or endorsement on the mortgage, or on the collateral security, operates as a payment, and if the money be afterwards delivered back by the mortgagee to the mortgagor, this transaction shall be construed to be a loan on the personal credit of the mortgagor, and the lien of the mortgagee, as to the sum paid, cannot be revived by the agreement of the mortgagor and mortgagee as to third persons who hold *bond fide* encumbrances upon the mortgaged premises.

Marvin v. Vedder, 5 Cowen, 671.

Where a note and mortgage are given to secure the payment of a sum of money, the renewal of the note does not operate as a discharge of the mortgage.

Pomroy v. Rice, 16 Pick. 22; Watkins v. Hill, 8 Pick. 522. See Van Deusen v. Frink, 15 Pick. 449; Crane v. March, 4 Pick. 131; Davis v. Manard, 9 Mass. 242; Thayer v. Mann, 19 Pick. 535; Peters v. Goodrich, 3 Conn. 146; Bolles v. Chauncey, 8 Conn. 389.

If a mortgagee who has received an equitable satisfaction of his mortgage, afterwards attempt to set it up as a subsisting lien upon the premises, satisfaction of the mortgage may be decreed, so that it may be cancelled on the record of mortgages.

Kellog v. Wood, 4 Paige, 578.

Where notes given with the mortgage are barred by the statute of limitations, yet, if they have not been paid, the mortgagee has his remedy on the mortgage.

Thayer v. Mann, 19 Pick. 535.

If one of several grantees of the mortgagor pay the mortgage debt, the mortgage will be discharged as to all of them.

Taylor v. Porter, 7 Mass. 355.

A receipt by the mortgagee, acknowledging satisfaction of the debt secured by the mortgage, is not conclusive evidence of a discharge of the mortgage so as to defeat the title under it, but it is competent for the mortgagee to explain the transaction.

Perkins v. Pitts, 11 Mass. 125; Parsons v. Weller, 17 Mass. 419; Porter v. Hill, 9 Mass. 34. See *vide contra*, Porter v. Perkins, 5 Mass. 233.

The act of taking possession of mortgaged premises, by the mortgagee, under a decree of foreclosure, is, by operation of law, an extinguishment of the mortgage debt.

Dorby Bank v. Landon, 3 Conn. 62.

A decree of foreclosure, without any subsequent act *in pais*, is an appropriation of the pledge, and an extinguishment of the mortgage debt.

Merrill v. Kilham, 8 Conn. 531.

Although it is a general rule that a mortgagee may first realize his collateral acquisition and then foreclose for the balance, yet where a policy of assurance on the life of the mortgagor was upon a further advance being assigned as a collateral security, with a declaration of trust that the mortgagee should stand possessed of the moneys to be received under the policy upon trust to pay his debts, &c., and without any power of sale; the court

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held this declaration to be a ground for excluding the right of sale which the mortgagee would otherwise have had, but allowed the mortgagee to foreclose, retaining the policy.

Dyson v. Morris, 1 Hare, 413.*g*

3. *Of the Precedency and Right of Redemption, where there are several Mortgagees or Encumbrancers: And herein of their Remedies against each other, as well as against the Mortgagor.*

Herein we must observe, as a sure and established rule, that he who hath the first mortgage, having the legal estate, shall prevail before all other subsequent mortgagees and encumbrancers. But if a man mortgages land by a defective conveyance, and afterwards mortgages by an assurance which is good and effectual, without notice, the second shall prevail, because that carries the legal title; and equity will not interpose, when both are equally upon valuable consideration. But if a man mortgages by a defective conveyance, and there are subsequent debts that do not originally affect lands, there the defect of such a conveyance shall be supplied against a subsequent encumbrancer, who acquires a legal title afterwards; for since the subsequent encumbrancer did not originally take the lands for his security, nor had in his view an intention to affect them, when afterwards the lands are affected, and he comes under the very person that is obliged in conscience to make the security good, he stands in his place, and shall be postponed to such defective conveyance.

Abr. Eq. 320.

This rule and distinction being grounded on the following case, we shall here insert it at large.

Henry Francis, father of the defendant Henry, in consideration of 400*l.* money lent, by feoffment, 17th July, 1665, mortgaged to the plaintiff's testator in fee a piece of ground called Pursefield, in the parish of Gibs, but no livery thereon, and covenanted for him and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment, free from encumbrances against him and his heirs, and all persons claiming under him, with covenant for farther assurance within seven years. Henry Francis, the father, Mich. 1669, borrowed of the testator 77*l.* on bond, and promised that the mortgaged premises should be security for it. Henry Francis, the father, in 1670, made his will and thereof made Henry Francis, his son, executor. The testator, Robert Burgh, died, and the plaintiff Eleanor proved his will. The defendant, Henry Francis, confesses several judgments, on bonds entered into by his father; (to wit) seven judgments, as heir, and one as executor to his father. One of these seven judgments was obtained by Heyman, a defendant, on an action brought the first or second day of Hilary term 1670, for 400*l.*, and all the other judgments were entered about the same time. This cause came to be heard by Sir Heneage Finch, Lord Keeper, assisted by Judge Wyld, who declared, that the court was fully satisfied that the plaintiff ought to be relieved, and that the said judgments ought not to encumber the premises, till the mortgage-money was fully paid; wherein the court did not ground its judgment upon the manner of obtaining the judgments all in a term, and most of them together, nor on the special way whereby the heir charged the lands, by pleading *riens per descent*, nor on the priority of the *teste* of the *subpœnas* before the *teste* of the original, on which the judgments were grounded; but upon the true nature of the case the court declared, that the debt due by the mortgage did origi-

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nally charge the lands, which the bond did not, till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands in prejudice of that equity; and the rather, because of the covenant for further assurance. And though the mortgage was defective in law, for want of livery, yet equity, which supplied that defect, charged the lands; and though the creditors *had no notice*, yet they shall be bound in this case, because they are put in no worse condition than they ought to be, viz. to be postponed to the mortgage. Therefore it was decreed, that the defendant Henry, the heir, should convey to the plaintiff, or her assigns, in fee, in manner as a master should direct, but redeemable on the payment of the said 400*l.* due on the former defective mortgage, and the premises to be held quietly against the plaintiffs, and all claiming under them, since the date of the mortgage; and he who has the equity of redemption may, in convenient time, bring a bill to redeem; and in default thereof, the now plaintiffs may bring one to foreclose. And a perpetual injunction was also awarded, to quiet the plaintiffs and their assigns in possession against all the defendants and the aforesaid encumbrances, and to stay all proceedings at law, but the plaintiffs to have no costs of this suit, unless some come to redeem; then, the now plaintiffs to have all the costs of this, and such suits, as is usual in the redemption of mortgages.

*Burgh v. Francis*, 19 December, 1670. ¶1 Eq. Ca. Ab. 323; Nels. Rep. 183; Finch's Rep. 28; and see 2 P. Wms. 491. Mr. Powell, p. 528, (6th edit.,) cites this case as an authority for a position not correct in itself, and clearly not borne out by the case; viz.: that if a second mortgagee with the legal estate has *notice* of a prior defective mortgage, still the second mortgage will be good, and he thinks *Oxwick v. Plumer*, *infra*, was decided on this ground; but in that case the second surrenderee had *not notice* of the prior surrender, and his security was held valid, expressly because he had *equal equity*, which could not have been if he had notice of the first defective surrender; and see Fowl. Eq. vol. 1, p. 38, *Jennings v. Moore*, 2 Vern. 609; and it is not clear that *Burgh v. Francis* can be considered as establishing a general rule that a subsequent judgment-creditor, without notice, will be postponed to a prior defective mortgagee. See *Coote*, 227, n., Fowl. *ubi supra*; Powell, 528, note Y, *Ibid.* 533, notes C, D, (6th ed.,)]

From this case, which hath been a governing case in the courts of equity, they have stated the difference before mentioned; for these bond-creditors did not originally pitch upon the land as a pledge and security for their money; and when they came afterwards, and reduced their securities into judgments, to affect the lands, yet, since they affect it in the hands of the heir, who was subject to this equity, and obliged in conscience to supply the defect in the execution of the deed, they can only stand in his place, and therefore must be subject to the defective security. But otherwise it had been, if there had been a subsequent mortgage duly executed, and without notice of the former; because the lands being then originally pledged for the money, and the mortgagee having the legal title, the defective securities that could not prevail at law should not overturn in equity a security that was equally upon valuable consideration. But the bonds in the former case did not originally take hold of the land at all; and when they were reduced to a judgment, they only took hold of the land, together with other things; and therefore equity doth not look on them as such charges on the land as are to take hold so immediately on it, that a prior defective security is not to be relieved and set up against them; especially, since such encumbrancers did not take the land as an original security, but came in afterwards, under the person who was obliged in conscience to supply that defect; for the difference between the two cases turns upon this, that in the case of a second valid mortgage we must, in all manner of justice, suppose that the

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mortgagee would not have lent if the land had not been offered to secure his money; and therefore when he hath the title at law, it is no equity to overturn it, or to postpone him to a defective security; but in the case of the bonds, the obligees lent their money upon the personal security, and not on the credit of lands; and therefore, when they come to affect the lands, they must stand in the place of the person that had made himself liable, in a court of equity, to answer and make good the defective security.

Thus, it was also ruled by the Lord Cowper, where the case was, A surrenders his copyhold by way of mortgage for money lent, and the surrender is not presented at the next court, according to the custom of the manor; A becomes a bankrupt, and the assignees, &c., are admitted, and bring their ejectment, and the surrenderee of the copyhold brings his bill in equity to be relieved. And, in this case, the court decreed a perpetual injunction in behalf of the surrenderee. For though it was said, that the creditors of the bankrupt were equally valuable as the surrenderee, and having the title at law, they ought to be preferred; yet it was overruled, because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; and therefore, when such creditors come under the bankrupt to charge the land, they ought to stand in his place, and come under the same obligation of conscience to make good the defective security.

2 Vern. 564; 2 Salk. 449, pl. 2., *Taylor v. Wheeler*. ¶ *Vide Mestaer v. Gillespie*, 11 Ves. 625; *Mitford v. Mitford*, 9 Ves. 100.¶

The case of *Oxwick and Plumer* turns upon the reverse of this judgment, and was thus:—Richard Wiseman, Esq., son and heir apparent of Sir Richard Wiseman, intermarried with Winefred Barrington, entitled to a portion of 4000*l.*, and brings his bill against the trustees of his wife; whereupon a decree was had, to pay unto him the fortune of his wife, upon making a competent settlement; and upon failure thereof, the fortune to be invested in lands by the approbation of the master. But upon the master's report, that no competent settlement could be made by Richard the son, it was, by choice of parties, invested in lands of Sir Richard the father, of equal value, part of which lands happened to be eight acres of copyhold, which in the settlement were limited, and declared apart from the freehold, to be to the use of the issue of the marriage, in common form, and afterwards in fee to the son, with the covenant from Sir Richard to surrender the copyhold. The wife dies without issue, and the son mortgages both copyhold and freehold together, for a valuable consideration, to Oxwick and others, plaintiffs; but without any surrender: the son dies, and the lands descend to Eliz. his sister and heir at law; the mortgagees foreclose Eliz. by a decree of the court, and enter and take possession; to whom being in possession Eliz. releases and confirms the estate in fee. Sir Richard the father, being then out of possession of the premises from the time of the settlement, which was made thirteen years past, surrenders the copyhold land to the defendant Plumer, for a valuable consideration. Plumer is admitted, and brings his ejectment; and the mortgagees bring their bills to be relieved. The Master of the Rolls, on solemn argument, dismissed their bill with costs; and held, that this court would not supply the defect of a surrender against a person that came in by title, upon surrender of the same premises. The case coming on to be reheard before my Lord Cowper, he was of the same opinion; and he took this difference, that when there are two persons that have equal equity, there, those that have the legal title shall prevail, because there is no equity to take from such persons the title that they have

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gained at law; as, where A, B, and C are three mortgagees, and C purchases in the mortgage of A to secure his own money *bond fide* lent; equity will never take from him the legal interest he hath gained. But if the contending parties in equity have not equal equity, then those that have the greatest equity shall prevail against the legal title; as, if a creditor takes hold of the land by a feoffment in mortgage, with\* livery, equity will supply the defective conveyance against a subsequent judgment-creditor; because the judgment-creditor not relying on the land for his security, he hath not equal equity to have it applied for the payment of his debt, as he that took it in mortgage. But in this case, where Plumer had equally lent money, and taken hold of the estate by a mortgage made with a legal surrender; so that the legal interest was in him; the covenant to surrender, though prior, cannot be set up against him who had no notice of it; but Oxwick must pursue his remedy at law, for the breach of the covenant.

Oxwick et al. v. Plumer et al., Pasch. 3d May, 1708; 12 Vern. 636, S. C. \*Without.]]

A precedent mortgagee discounts his mortgage-money by purchase of parcel of the land, and the subsequent mortgagee, having also a judgment, comes to be relieved; the precedent mortgagee pleads this purchase; and without notice it is good; for having a legal title by the first mortgage, kept on foot precedent to the second, this court will not destroy it; and the judgment on record is no notice, without express notice from the party in interest.

Churchill v. Grove, 1 Ch. Ca. 36.

If a man makes a voluntary deed, and mortgages the same lands, this deed, though fraudulent as to the mortgagee, is good to pass the equity of redemption, because the voluntary conveyance binds the party and his heirs.

Rand v. Cartwright, 1 Ch. Ca. 59.

Tenant in tail demiseth the lands for ninety-nine years, by way of mortgage, under a condition of redemption; and on his marriage suffers a recovery, and in consideration of the portion settles a jointure; then the husband borrows more money of the mortgagee, and appoints the term as a security. The recovery inures to make good the term; and if the mortgagee had no notice of the jointure, he shall be allowed his whole money, for the entail is destroyed by the recovery; because every recovery places the fee in the recoverer; and neither the husband nor wife, that comes in by title under him, can vacate this act precedent; so that the subsequent recovery of tenant in tail makes good all precedent encumbrances.

Goddard v. Complin, 1 Ch. Ca. 119.

¶ When a mortgage is executed to secure the payment of promissory notes, and the notes are misdescribed in the mortgage, the mortgagee is entitled to relief in equity against a subsequent mortgage.

Porter v. Smith, 13 Verm. 492.

A second mortgagee, after the satisfaction of the first mortgage, may claim from the first mortgagee, after notice, the rents and profits which have not been accounted for to the mortgagor, so far as the same are necessary to the satisfaction of his mortgage.

Gordon v. Lewis, 2 Sumner, 143.

Where a mortgagee intentionally and understandingly cancels his mortgage, and in lieu thereof takes a deed of the same premises, and the mortgagor executes a second mortgage upon the same premises, prior to the deed,



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the first mortgage, in the absence of fraud, will not be revived, nor the second mortgagee prevented from reaping the benefit of his priority acquired by the cancellation of the first mortgage.

*Frazer v. Inalee*, 1 Green's Ch. R. 239.

Where the purchaser of the equity of redemption in mortgaged premises, which are subject to the encumbrance of two mortgages of different dates, takes an assignment of the senior mortgage, for the protection of his title, such mortgage will not be merged in the equity of redemption, so as to give the owner of the junior a preference in payment out of the proceeds of a sale of the mortgaged premises.

*Millsbaugh v. M'Bride*, 7 Paige, 509.

When two mortgages are given simultaneously upon the same property, to different persons, without any intention of giving a preference to either, and each mortgagee is aware of giving of the other mortgage at the time he receives his own, neither of them is entitled to any preference in payment, under the recording act, although one of them procures his mortgage to be first recorded.

*Rhoades v. Canfield*, 8 Paige, 545. See the following as to disputes between mortgagees claiming a preference: *Naylor v. Throckmorton*, 7 Leigh, 98; *Goring's Executors v. Shreve*, 7 Dana, 70; *Gregg v. Arrott, Lloyd & G.* temp. Sug. 246; *Kirby v. O'Shee, Jones' Exch.* R. 565; *Jones v. Jones*, 8 Sim. 633; *Hoag v. Rathbun*, 1 Clark, 12; *Douglass v. Peele*, 1 Clark, 563; *Lismore v. Chamley, Hayes' Exch.* R. 329; *Van Riper v. Williams*, 1 Green's Ch. R. 407. *g*

¶But if the tenant in tail conveys *in fee*, a subsequent recovery will not be good without the concurrence of the first grantee, for want of a good tenant to the *præcipe*.

Although the tenant in tail mortgagor, by suffering a recovery or levying a fine, lets in the mortgage, it has been decided, that if he become bankrupt after making a mortgage, the bargain and sale by the commissioners has not the same effect, notwithstanding the words of the statute 21 Jac. 1, c. 19, § 12. This decision has, however, been questioned by the Lord Chancellor in *Pie v. Daubuz*, 3 Bro. C. C. 595; but although some of the reasons on which the judges relied may not perhaps be satisfactory, yet the decision itself, it is apprehended, is supported by sound principle. The court in that case certainly appear to have treated the estate of the mortgagee as *absolutely void* on the death of the bankrupt mortgagor, since he could only affect the life-estate by the mortgage without recovery: whereas it would seem that the estate is only *voidable* by the entry of the issue in tail, and not void according to *Machell v. Clarke*, 2 Ld. Ray. 778. Admitting the estate, however, to be only voidable, there seems no sound reason why the assignees should not enter and avoid it after the death of the bankrupt; for though the assignees stand in the place of the bankrupt for *some* purposes, they do not for *all*; and are clothed with a trust for the creditors, which places them in a very different situation from the bankrupt.

*Beck v. Welsh*, 1 Wils. 276; and see *Coote*, 217, *Powell*, 190 a, (6th ed.)

If, however, there is a covenant in the mortgage-deed for further assurance, as is usually the case, relief may be had on that covenant, and the assignees will be directed to convey to the mortgagee.

*Edwards v. Applebee*, 2 Bro. C. C. 652; *Pie v. Daubuz*, 3 Bro. C. C. 595. *||*

A man makes a mortgage, and afterwards makes a marriage settlement of the equity of redemption, wherein he limits it on the wife; and then on the

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issue of his body, with remainder in tail to his brother; the mortgagee exhibits his bill against the mortgagor, to have his money, or that he may stand foreclosed, without making the brother a party: and has a decree accordingly; and afterwards the mortgagor dies without issue, and the lands remain to the brother by the marriage settlement, who prefers his bill to redeem. The bill was dismissed; for having made those parties to the bill of foreclosure, that were parties to the mortgage, the mortgagee did as much as was possible; and since at law a fine, or other conveyance, extinguishes an equity of redemption, which is but a *chose in action*, though the modern course hath allowed it to be transferred, yet it ought not to be so allowed, that the mortgagee should not know from whom to seek a foreclosure, in order to keep him an eternal bailiff to the mortgagor; therefore, after length of time, and in behalf of a mere volunteer, they would not open the account, after such decree to foreclose had against the person that was party to the mortgage; for possibly the mortgagee, since the foreclosure, had kept no account, since he was not bound to do it.

Roscarrick v. Barton, 1 Ch. Ca. 217, &c.

<sup>B</sup> Where a mortgagor assigned all his property, including his equity of redemption in the mortgaged premises, to the mortgagee and another person, as trustees for the benefit of creditors; held, that on a bill of foreclosure by the mortgagee to enforce his specific lien upon the premises, the husband and wife of mortgagor, (she having joined in the mortgage,) and the co-trustee, were necessary parties.

Paton v. Murray, 6 Paige, 474.

[H being seised in fee, mortgaged for years, and afterwards, in 1734, made his will, and devised his estate to his son and his heirs, subject to an annuity to his wife for life, and to the encumbrances upon the estate; and in case his son should die without issue, to be divided amongst his three daughters, or such of them as should be living at the death of his son; and if his son and daughters should all die without issue, then to his wife for life, remainder to his own right heirs. A bill was brought by P, as assignee of the original mortgagee, against the widow of the mortgagor, and her son, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cause was heard, and a decree made for an account and foreclosure, unless redeemed by the mother or son. The account was taken before the master, and the time for redemption being several times enlarged, and at last elapsed, the son, having attained twenty-one, released the equity of redemption; so that the foreclosure was not made absolute against him, but was made absolute against the wife. The son afterwards died without issue, and R having bought the daughters' interest for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellor was clear of opinion that P was not entitled to redemption. That the first tenant in tail being a party to the foreclosure was sufficient. That he sustained the interest of everybody, and those in remainder were considered as cyphers. That it would be very inconvenient if the remainder-men were necessarily to be parties. There might never be an absolute foreclosure. The account would be endless, and the foreclosure would be open to every contingent remainder-man. That nobody would lend money upon such terms. That the release in this case was equal to an absolute foreclosure by order. That the accounts were taken, and the time for redemption elapsed, and that this case was not so strong as that of Roscarrick and Barton.

Reynoldson v. Perkins, Amb. Rep. 564; [1 Dow. P. C. 31.]

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If a man mortgages lands, and then confesses several judgments, and some of the persons, who have judgments, give the mortgagee notice, and afterwards he obtains, against the mortgagor, a decree to foreclose: such persons, that give notice of their interest, shall, notwithstanding, redeem; because they are creditors for a valuable consideration, and the mortgagee had notice of them, that he might have made them parties to his bill; but the persons who gave no previous notice of their judgments are totally barred of all redemption, by the former decree.(a)

*Greswold v. Marsham*, 2 Ch. Ca. 170. [(a) But this seems not settled, *Godfrey v. Chadwell*, 2 Vern. 601; and see 1 *Powell*, 306, note (G), 551; note (S), and 2 *Ibid.* 988 a.]]

A second mortgagee may redeem the first, after a decree obtained by him to foreclose, although the first mortgagee had no notice of the second mortgage before the decree.

2 Vern. 601; and vide *Morret v. Westerne*, *suprd.*

And a decree to foreclose, though made absolute, signed, and enrolled, is no plea to redeem; if surreptitiously procured.

*Lloyd v. Mansell*, 2 P. Wms. 74.]

If a man mortgages his estate to two, who each of them lend several sums upon the estate, as appears by notes under their hands, and one of them dies, there shall be no survivorship: for it is considered as a sum of money still subsisting apart, for which the lands are only a pledge and security; so that the money being distinct sums, and the interest in it being distinct and separate, there can be no survivorship between them.

1 Chan. Rep. 57, 58, *Petty v. Styward*.

If a mortgagee, after notice of a subsequent mortgage, joins with the mortgagor in a sale of the lands to a stranger, the money received by either for the purchase shall sink so much of the purchase-money: and in this case the mortgagor, being son-in-law to the mortgagee, and he having entered, and afterwards suffered the mortgagor to take the profits for several years, without requiring interest, it was held by the court, that the interest of the first mortgagee should not affect the lands, so as to keep out the second mortgagee longer than he would have been, had the interest been duly paid.

Pr. Ch. 30, *Bentham and Haincourt*.

If A, being about to lend money to B on a mortgage, sends C to inquire of D, who had a prior mortgage, whether he had any encumbrance on B's estate, and it is proved that C went to him, and spoke to him accordingly, and D denied having any; D's mortgage shall be postponed; [but D must be informed of A's intention to lend money, in order to fix him with the fraud.]

*Ibbotson v. Rhodes*, 2 Vern. 554. [See Bro. C. C. vol. i. 337, n. 5; *sed vide Powell*, 446, n. (Q).]

[On a treaty of marriage between A and B his wife, C, the father of A, and D, the father of B, had a meeting together; at which meeting M, who had a mortgage upon C's estate, was accidentally present; C and D discoursed together on the subject, and talked of making a settlement upon the estate on which the mortgage to M was secured: M never mentioned to the father of B that he had such mortgage, but called out C, and reminded him thereof. M then agreed with C that he would take his personal security for the money, and they returned into the room together, when an agreement

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was entered into between C and D, in the presence of M, to settle the estate in strict settlement. Afterwards, the marriage took effect, and M brought an ejectment to recover the possession of this estate as mortgagee; whereupon A and B, his wife, brought a bill against M and C, in order to have a perpetual injunction: M admitted all the facts, but pretended not to remember any thing of the agreement to accept C's personal security for the money lent. C was examined as a witness in the cause for both parties, and swore to the fact of that agreement: and the Lord Chancellor was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that M, having voluntarily concealed his mortgage at the time of the treaty of marriage, was not entitled to have any benefit from it against the plaintiff.

*Berrysford v. Millward*, Barnard. Rep. 101; 2 Atk. 49, S. C. Vide *Shep. Prac. Couns.* 482, pl. 9 a, *qu.* if such cases do not avoid prior claim at law as fraudulent.

D, N, and H, having lent B 8000*l.* upon a mortgage in fee of the manor of F, and on a statute in 1600*l.* penalty as a farther security; and H being a counsellor, and afterwards consulted by J as to a loan of 200*l.* to B on a mortgage of the manor of G, encouraged him to lend his money, drew the mortgage-deed, and inserted therein a covenant that the estate was free from encumbrances, making no mention of the statute which was taken because F was supposed to be deficient. The question was, Whether H should be admitted to take advantage of the statute to lessen J's security upon the manor of G? And it was held he should not; for if he, who only concealed his encumbrance, should be postponed, much more ought H, who was intrusted as counsel, by the mortgagee, promoted the loan, and drew the conveyance with covenants that the estate was free from encumbrances.

*Draper et al. v. Borlace et al.*, 2 Vern. 370. [See *Powell*, 439 a.]

And if a first mortgagee be a witness to a second mortgage-deed, and, knowing the contents thereof, do not acquaint such second mortgagee with his former mortgage, this will give the latter a preference. It is likewise said, that it will make no difference, although it be not in proof that the witness knew the contents of the second mortgage; for, since it does not appear but that he might have known them, the law will presume that every witness, who can write or read, is acquainted with the substance of a deed or instrument which he, having attested, undertakes to support by his evidence.

*Mocatta et al. v. Murgatroyd*, 1 Will. Rep. 393. [But Mr. Cox, the editor of *Peere Williams's Reports*, in a note added to the above observation, doubts the truth of the proposition, and questions whether the bare attesting a subsequent encumbrance, without other circumstances of presumptive notice, will postpone a prior encumbrance, since, at that rate, a prior mortgagee or encumbrancer may, without any fraud, or ill intention on his side, be liable to be cheated of his security.—And so (he observes) he found it said by Lord King, in the author's (*Peere Williams's*) report of an anonymous case, in Mich. Term, 1732. And Lord Hardwicke, before whom this point was agitated, in the case of *Wilford and Beezly*, 1 Ves. 6, said, "that he did not think that the bare attesting a deed as a witness would create such a presumption of his knowledge of the contents, as to affect him with any fraud therein; "for a witness is only to authenticate it, and not to be privy to the contents."—And Lord Thurlow, in the case of *Becket and Cordley*, 1 Br. Ch. Rep. 357, seems to have been of a similar opinion with Lord Hardwicke upon this subject; for speaking therein of the case of *Mocatta and Murgatroyd*, his lordship says, "the first mortgagee was a witness to the second mortgage, and was therefore postponed. I do not leave this as a case which I should determine in the same manner; for a witness in practice is not privy to the contents of the deed. The book refers to a case where Lord King denies the law to be so."'] [Vide *Fonb. Eq*

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v. 1, 165, (5th ed.); Sug. Vend. and P. 654, (5th ed.); Reed v. Williams, 5 Taunt. 287, per Lord Eldon, 6 Ves. 190; Holmes v. Custance, 13 Ves. 979; Lord Ranelife v. Parkyns, 6 Dow. P. R. 224.]

N's younger brother, having an annuity of 100*l.* *per annum* charged on lands by his father's will, contracted with H, for sale thereof; H went to N, and informed him of his intended purchase, desiring to know of him if his younger brother had a good title to it, and whether his father was seised in fee at the time of making the will, and if it had ever been revoked. N told him he believed his brother had a good title, and that he had paid him the annuity for twenty years; but at the same time informed him, that he heard there was a settlement made of his father's lands before the will which was in the hands of T, but that he had never seen it, and therefore could not tell what were its contents; and encouraged the purchase, telling H, he had not only paid his brother the annuity to that time, but had also paid his sisters 3000*l.* under the same will. The purchase was completed, and afterwards N got the settlement into his hands, and would have avoided the annuity, the lands being thereby entailed. H's bill was to have the annuity decreed on repayment of his purchase-money; and though, on the hearing, there was no proof that N had any notice of the contents of this settlement at the time he promoted the purchase, yet the Lord Keeper decreed the payment of the annuity merely on the encouragement N gave H, to proceed in completing the contract; for that it was a negligent thing in him not to have made himself acquainted with his own title, that he might have informed the purchaser of it, when he came to inquire of him.

Hobbs v. Norton, 1 Vern. 136. Vide 2 Eq. Ca. Abr. 515, pl. 3; 9 Vin. Abr. 415, pl. 24, Watts v. Creswell. [See Powell, 412, note (N.)]

¶ And such constructive fraud not only binds the party himself personally, from whose negligence it arises, but also binds the lands, &c., charged. Thus, B, the elder brother of I B, was under settlement entitled to a real estate, charged with 8000*l.* for one younger child of the marriage, but subject to a proviso, that, if the father should give to any of his daughters, or younger sons, any money or lands, for or in advancement in marriage or *otherwise*, the value thereof should be deducted from the portion, unless he should by writing declare to the contrary. The father devised to I B 4000*l.* after the death of his (the son's) mother, and the residue of his personal estate, and died. Then the elder son suffered a recovery, by which he obtained the fee-simple in the lands. Afterwards I B applied to P, to lend him 3000*l.* on the security of the 8000*l.* portion, for which he assigned 5000*l.*, part of the 8000*l.*, as a security, and also entered into a bond in a penalty for the same. P, previous to lending the 3000*l.*, applied by his solicitor to B, informing him of I B's application, and desired to be informed by him, whether the 8000*l.* was a subsisting charge upon the estate, when B declared that it was, and that P might safely advance his money upon the security. B also afterwards applied for and obtained a sum of money to pay off the 8000*l.* portion; and gave P's solicitor notice that he would pay off the 3000*l.* at the end of six months after the notice: B dying soon after, the money was not paid, but from the death of his father, and down to his own death, he paid the interest of the 8000*l.* Upon his death the estate descended to his two daughters. B had possession of the settlement, and knew of the advancements of the father to I B; but, supposing them not to affect the portion, did not reveal them to P. A bill was filed by the mortgagee against the daughters to have the 3000*l.* raised and paid out of the

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settled estate. They set up as a defence, that the bequest of the 4000*l.*, and of the residue, was a satisfaction for the portion under the proviso inserted in the settlement. And it being held that the bequest was a satisfaction, it then became a question, Whether B had not bound himself and the land notwithstanding, by his declaration "that the portion was a subsisting charge?" It was agreed on behalf of the daughters, that if B knowingly misrepresented the case to P's attorney, it certainly must bind him. All the cases were that the person misrepresenting was bound by his own misrepresentation; but this went something farther, namely, to bind the lands. If a man was guilty of a fraud, by which the land was affected, the misrepresentation would bind the land; but if there was no fraud, the land could not be affected. It was the duty of P's solicitor to make every inquiry; he ought to have made the trustees parties. It was great negligence on his part not to take a legal security. He ought to have inquired what I B took under the will. The principle the court went upon, was by acting upon the conscience of the defendant in such cases; if the defendant was acting against conscience, the court would apply a remedy, but there was in this case nothing against conscience. B was ignorant of the legal effect of the legacies. If then there was no fraud, there was nothing for the court to relieve against, and the land could not be bound. But by Buller, J., (who sat for the chancellor,) the only question is, Whether P has a right to have 3000*l.* raised for payment of this debt, out of the estate of *James*? It is argued, that this is not to be done unless there is such a fraud as to effect land, and that here was no fraud, but B acted innocently. It brings to my mind a case tried before me at Guildhall, by one merchant against another, for giving a false character of a third person, by which the plaintiff was induced to give him a credit, and lost his money; my direction to the jury was, that if one man tells another a falsehood, by which he is injured, the deceived person has his remedy by an action. Those who wish to maintain the daughter's case argue, that B, the father, was a total stranger to the case, which argument admits the principle, that if he had been interested the declaration would bind. Here, the person of whom the question was asked certainly had no interest. Fraud is a question of law, and of fact. It is always considered as a constructive fraud where the party knows the truth and conceals it, and such constructive fraud always makes the party liable. I think that, here, B knew of the proviso and advancements, and that in this court he was obliged to take notice of them. In fact he had express notice. It is not like the case of a latter deed referring to a former one. The inquiry was a very proper one on the part of P, and completely repelled any imputation of negligence in his agent, and the inquiry was properly made of the party immediately interested. B, at the time of the inquiry, had the equitable interest in the estate, and, upon the application, assured P that he might safely lend his money. The inquiry was the most material P could make. If B admitted the term to be in existence, he must be bound by his admission. He had full notice, and induced P to lend his money, which was a fraud that would affect the daughter's estate. The term must, therefore, be held to be in force to secure the 3000*l.*, and the trustees must raise that sum.

*Pearson v. Morgan*, 1 Bro. Ch. Rep. 63; 2 Bro. Ch. Rep. 388. [See *Pasley v. Freeman*, 3 Term R. 31; *Kyre v. Dorset*, 1 East, 318; *Harcourt v. Cressy*, 2 *Ibid.* 92; *Verdon v. Kers*, 19 *Ibid.* 682; *Tapp v. Lea*, 3 Bos. & P. 367, and *Evans v. Bicknell*, 6 Ves. 174; and *Knowl of Sir William Grant*, 10 Ves. 473.]

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One Goff, being possessed of the Thatched-House at St. James's, on a building lease for sixty years, mortgages it to Dr. Lancaster and one Haberfield, for securing 600*l.*, which the defendant afterwards paid off, and advanced to Goff 600*l.* more, and took an assignment of this mortgage, but had not the original lease delivered to him till some days after the assignment. Goff afterwards, being in a declining way, proposed to borrow of the plaintiff 350*l.* on a mortgage of a vault and two rooms, part of the mortgaged premises; and on a treaty for that purpose, one Remington, who acted for the plaintiff, desired to see the original lease; Goff told him, that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it safe to trust them in his own house, where all sorts of company resorted; upon which Goff goes to the defendant, who was an attorney in the city, tells him he was about agreeing with a person for the rebuilding part of the premises, at so much a foot square, which would better his security, and desired him to let him have the original lease, that he might see the dimensions of the house: the defendant would not trust him with the lease in his own power, but goes along with him to the Thatched-House; and after he had been there some time, Goff sends for the plaintiff and Remington, told them he had now the original lease, which they might see; and upon their coming to his own house, Goff goes into the room where the defendant was, and desires him to let him have the lease, to show the person he had mentioned, for that he was now in the house; and accordingly the defendant lets him have the lease, which he carries to the plaintiff and Remington; and they being satisfied therewith lend him the money, and take a mortgage of the vault and two rooms, insisting at the same time to have the original lease delivered to them; but Goff urging that it concerned much more than the plaintiff had in mortgage, and that he could not part with it, the plaintiff permitted him to keep it; and he thereupon, in about an hour's time, delivered it again to the defendant, without acquainting him with what he had done; and the defendant swore expressly in his answer, that he had no notice of this transaction, or of the plaintiff's mortgage. Afterwards, the plaintiff lent Goff a further sum of money, and he prevailed on the defendant to let him have the original lease a second time; but there was no proof that the defendant knew the occasion of it, and he, by his answer, expressly denied his having notice of it. Goff afterwards failed, and thereupon the defendant brought his ejectment, and recovered; and this bill was brought to have the defendant's mortgage postponed, upon pretence that here was a manifest fraud on the plaintiff, and that the defendant was privy to it; and at the Rolls the plaintiff had a decree accordingly: but, on appeal, the decree was reversed. Lord Chancellor said, that if a man makes a mortgage, and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will, without doubt, in equity postpone his own mortgage: so, if such mortgagee stands by and sees another lending money on the same estate, without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority. But here is no manner of proof that the defendant knew any thing of the plaintiff's lending his money; nay, if there had, yet the plaintiff appears guilty of so much a grosser neglect, that he ought not to prevail; for the defendant intrusted Goff with his original lease but for a very little while; the plaintiff takes his word, that he could not part with it, and leaves it wholly in his power to go on in defrauding whom else he

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had a mind to. Besides, it appears the defendant was imposed on by Goff, for he parted with the lease only to better his own security, and had the most specious pretence that could be for it; and therefore it cannot be, without manifest proof, objected to him, that he left Goff have the lease to show the plaintiff, or with a design to draw in the plaintiff to lend his money. His lordship dismissed the bill with costs, unless the plaintiff should, within such a time, redeem the defendant.

*Abr. Eq.* 321, 322, *Peter v. Russel*. [See *Powell*, 473, note (V), (6th edit.)]

[S made a mortgage of lands to H, who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in London, and S pretending the title-deeds were in the country. Afterwards S borrowed 2000*l.* of E on a mortgage of the same lands, at the same time producing and delivering to him all his title-deeds, which were perused, and approved by his counsel. Then H exhibited a bill to foreclose E and to compel him to discover the title-deeds relating to the premises, and to have them delivered up to him, insisting upon them as owner of the land. E pleaded the mortgage made to him, and that he had no notice of the prior mortgage to H, and insisted, that the court ought not to aid H and take the title-deeds from him, without ordering him to be paid his mortgage-money; and so it was decreed by the Chancellor.

*Head v. Egerton*, 3 P. Wms. 280.

S being seised in fee of certain estates, subject to an outstanding term of years in R and E, by indenture of lease and release, dated the 4th and 5th days of June, 1732, conveyed them to D and her heirs, for securing the payment of 1000*l.* and interest, and covenanted to produce the deeds respecting the terms for years. Afterwards R and E assigned the term to other trustees, in trust for S, his heirs and assigns; and then S by indenture, dated the 19th of December, 1732, conveyed the same estates to N by way of mortgage, for securing to her 3000*l.* and interest, with a declaration that the trustees of the term should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to D. Afterwards D brought an ejectment; V, who claimed under N, defended it, and set up the term with a declaration of the trust of it in favour of N; upon this, D brought her bill in equity. The question was, which should be preferred; D, who had the first declaration of the trust of the term, or V, who had the *subsequent* declaration of the trust, but had the custody of the deed? Lord Northington held, that a declaration of trust in favour of an encumbrancer was tantamount to an actual assignment, unless a *subsequent* encumbrancer, *bond fide*, and without notice, procured an assignment; and that the custody of the deeds, respecting the term, with the declaration of the trust of it, in favour of a second encumbrancer, was *equivalent* (a) to an actual assignment; and therefore gave him an advantage over the first encumbrancer, which equity would not take from him.

*Stanhope v. Verney*, vide *Co. Lit.* (last edit.) 293 b, in note; [2 *Eden*, R. 81, S. C. See 2 *Ves. & Bea.* 83.] (a) That is in equity.

If the mortgage be of a reversion, there is no reason to postpone the mortgagee upon the mere abstract fact of his not having required or produced the title-deeds and writings; because, in such cases, the title-deeds and



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writings do not properly belong to the reversioner, nor has he, generally speaking, any means by which he can procure them, if refused by the tenant for life, or possessor of the particular estate.

This question was agitated in equity, before Lord Thurlow, in the case of *Tourle against Rand*, which was as follows: R being, as supposed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder in tail) *expectant on the death of his mother*, in certain freehold estates, conveyed his reversion and remainder, expectant on the death of his mother, to A in fee, by way of mortgage. At the time of making the mortgage, the deeds and writings were in the hands of a collateral relation, but A's attorney was informed by the mortgagor, that they were in the possession of the mother, who would not consent to part with them, she being then in possession of the estate as tenant for life, which she continued until the time of her death. Immediately after her decease, A's attorney applied to R for the possession of the title-deeds, to which R's general answer was, that he would send them in a day or two, or to that effect. Shortly afterwards, R, being then tenant in tail in possession, (but supposing himself tenant in fee of the above estate, and being also possessed of a leasehold estate,) mortgaged both estates to T. At the time when the latter mortgage was made, all the title-deeds relating to the estates were delivered to T's attorney, and continued in T's possession. Sometime afterwards, T filed his bill to foreclose the mortgaged premises, and, among other things, charged that A ought not to have permitted the title-deeds and writings to have remained in the hands of R, that he left them in his hands for the purpose of enabling him to raise more money on the security of the premises, and that the same was a fraud on T, and that therefore A ought to be compelled to redeem T's mortgage, or ought to be debarred of any interest which he might have in the premises till T's mortgage should be satisfied. It was contended on the part of T that where a prior mortgagee leaves the title-deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced by the title appearing on the deeds to lend his money; that the second mortgagee therefore, having the deeds, should be preferred. But Lord Thurlow, C., said, that he did not conceive that a first mortgagee not taking the deeds was *alone* sufficient to postpone him; if it were so, there could be no such thing as a mortgage of a reversion. *In that case*, the deed being in the hands of tenant for life, is not sufficient to turn him round. The first cases where the prior mortgage was postponed were cases of fraud, then the same was done in case of gross negligence.<sup>(a)</sup> Here was no *laches*; the mortgagee could not compel the tenant for life to give up the deeds; though a dowress, upon a confirmation of her title, might be compelled, the tenant for life could not, although after her decease, he might have filed a bill. But that was not sufficient to charge the mortgagee.

*Tourle v. Rand*, 2 Ch. Rep. 650. (a) "I find no case," saith Eyre, C. B., "that goes the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee, as if he were guilty of fraud or wilful neglect." 2 Anstr. 440.

In the case of *Goodtitle against Morgan*, Mr. Justice Buller considers it "as an established rule, in a court of equity,<sup>(b)</sup> that a second mortgagee who has the title-deeds, without notice of any prior encumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage, without taking the title-deeds, he enables the mortgagor to commit a fraud. If this

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has become a rule of property in a court of equity, (says the learned Judge,) it ought to be adopted in a course of law." *Quere.*

(b) 1 Term Rep. 762.] {This doctrine of Mr. J. Buller is founded upon error. The mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence which amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee. 6 Ves. J. 183, 190, Evans v. Bicknell; 12 Ves. J. 130, Barnett v. Weston; 1 Fonbl. Eq. 153, note (n)—It is not necessary in New York that the mortgagee should have possession of the title-deeds; leaving them in the hands of the mortgagor is no evidence of fraud. The statute requiring the registry of the mortgage effectually secures subsequent mortgagees or purchasers against fraud or imposition. Such registry is equivalent to notice; and subsequent purchasers and mortgagees must look to it at their peril. 2 Johns. Rep. 510, Johnson v. Stagg. So in Pennsylvania. 1 Bin. 522, Evans v. Jones, cited by Yeates, J.}

||But it is now held, that the mere circumstance of the first encumbrancer not possessing the title-deeds is not alone sufficient to postpone his encumbrance, without other circumstances to make out a case of fraud.

Evans v. Bicknell, 6 Ves. jun. 183; Barnett v. Weston, 12 Ves. 133; Harper v. Faulder, 4 Madd. 129; and see Bailey v. Fermor, 9 Price, 376.]

Although a deposit of title-deeds for the security of a debt amount to an equitable mortgage, yet if a creditor of the mortgagor, fearing his immediate insolvency, take a conveyance of the same estate, without notice (a) of the encumbrance, equity will not prevent him from availing himself of his legal estate.

Plumb v. Fluit, 2 Anstr. 432. (a) *Secus*, where there is notice either actual or constructive. Birch v. Ellames, 3 Anstr. 437. ||See Hiern v. Mill, 13 Ves. 114.]

By the 4 & 5 W. 3, c. 16., reciting that great frauds and deceits are often practised by necessitous and evil-disposed persons, in borrowing money, and giving judgments, statutes, and recognisances privately, for securing the repayment of the said money; and the same persons do afterwards borrow money, upon security of their lands, of other persons, and do not acquaint the later lender thereof with the same; whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognisances, before they can have any benefit of the said mortgages; and that divers persons do many times mortgage their lands more than once, without giving notice of their first mortgage; whereby lenders of money upon second or after-mortgages do often lose their money, and are put to great charges in suit and otherwise; for remedy whereof it is enacted, "That if any person shall borrow any money, or, for any other valuable consideration, for the payment thereof voluntarily give, acknowledge, permit, or suffer to be entered against him, or them, one or more judgment or judgments, statute or statutes, recognisance or recognisances, to any person or persons, creditor or creditors; and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or, for other valuable consideration, become indebted to such person or persons, and for securing the repayment and discharge thereof, shall mortgage his, her, or their lands or tenements, or any part thereof, to the said second or other lender or lenders of the said money, creditor or creditors, or to any other person or persons, in trust for or to the use of such second or other lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment or judgments, statute or statutes, recognisance or recognisances, in writing, under his, her, or their hand or hands, before the execution of the said mortgage or mort-

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gages; unless such mortgagor or mortgagors, his, her, or their heirs, upon notice to him, her, or them given by the mortgagee or mortgagees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, in writing, under his, her, or their hands and seals, attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognisance or recognisances, shall within six months pay off and discharge the said judgment or judgments, statute or statutes, recognisance or recognisances, and all interest and charges due thereupon, and cause or procure the same to be vacated, or discharged, by record; that then the mortgagor or mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity or elsewhere, for redemption of the said lands and tenements, or any part thereof; but the said mortgagee and mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy the said lands and tenements, for such estate and term therein as were or was granted and settled to the said mortgagee or mortgagees, against the said mortgagor or mortgagors, and all person and persons lawfully claiming from, by, or under him, her, or them, freed from equity of redemption, and as fully, to all intents and purposes whatsoever, as if the same had been purchased absolutely, and without any power or liberty of redemption."

[By the Roman law, the making a second mortgage without giving notice of the first was punished as a crime called *Stellionatus*; but the crime was not committed if the land was equal in value to all the sums charged on it. Dig. 13, 7; 36, 1.] *See* Bouv. L. D., *Stellionate*.

§ 3. "And it is further enacted, That if any person shall mortgage any lands or tenements to any person or persons, for security of money lent, or otherwise accrued or become due, or for other valuable considerations; and if the said mortgagor or mortgagors shall again mortgage the same lands or tenements, or any part thereof, to any other person or persons for valuable consideration, (the said former mortgage being in force, and not discharged,) and shall not discover to the said second or other mortgagee or mortgagees, or some or one of them, the former mortgage or mortgages, in writing, under his, her, or their hands, that then, and in these cases also, the said mortgagor or mortgagors, his, her, or their heirs, executors, administrators, or assigns, shall have no relief, or equity of redemption, against the said second or after-mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, upon the said after-mortgage or mortgages; but that such mortgagee or mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements, for such estate and term therein as were or was granted and conveyed by the said mortgagor or mortgagors, against him, her, or them, his, her, or their heirs, executors, or administrators respectively, freed from all equity of redemption, and as fully, to all intents and purposes, as if the same had been an absolute purchase, and without any power or liberty of redemption.

§ 4. "Provided always, and be it further enacted by the authority aforesaid, That nevertheless if it so happen that there be more than one mortgage at the same time made, by any person or persons, to any person or persons of the same lands and tenements, the several late or under mortgagees, his, her, or their heirs, executors, administrators, or assigns, shall have power

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to redeem any former mortgage or mortgages, upon payment of the principal debt, interest, and costs of suit to the prior mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns.

§ 5. "Provided always, That nothing in this act contained shall be construed, deemed, or extended to bar any widow of any mortgagor of lands or tenements from her dower and right in or to the said lands, who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such dower or right."

It hath been held, that if a man mortgages certain lands to one man, and mortgages those lands with some others to another; though this seems to be a case omitted out of the above statute against clandestine mortgages, yet if it appears to be a contrivance to evade it, as, if an acre or two of land were only added, this will not exempt it: also, a person, who will take advantage of the statute, must be an honest mortgagee; and therefore if a man has used any fraud or practice in obtaining a second mortgage, he shall not have the benefit of the statute.

*Stafford v. Selby*, 2 Vern. 589; [1 Eq. Ca. Ab. 320, pl. 5.]

4. *How far the purchasing of a precedent Mortgage or Encumbrance will protect such Purchaser, and entitle him to a Precedency of Redemption: [And herein of Notice, Registration, and Tacking.]*

It hath been established as a rule in the courts of equity, that if a man mortgages lands to A, and afterwards makes a subsequent mortgage to B, without notice at the time of his making the mortgage, and B purchases in a precedent mortgage, which stands out at law, though nothing on it be due in equity, or a statute whereon money is due, which he extends, he shall hold the land till he is satisfied what is due upon both securities, though he had notice of A's mortgage before his second purchase of the prior security; because, having at first innocently lent the money, he may do what he can to secure that money from being lost; and when he hath purchased in the prior encumbrance, it is but just that equity should leave it in the same manner that it stood at law; for there is no room for equity to interpose, to take away the security the law had given, where the person that has the security comes into the title without any corruption at all; and it were partiality, and not equity, to interpose where the security gives the fair lender a good and legal title. And it is all one, whether such third lender or purchaser takes in a mortgage, that is an interest vested, or a statute, that is only a charge; for both are real liens, and sufficient to overthrow the title of the mesne encumbrancer, whether money be due on the first security or not, since that does not alter the legal title.

*Marsh v. Lee*, 2 Vent. 337; *Chan. Ca.* 36, 149, 162, 166; *Hard.* 173; 2 *Chan. Ca.* 208; Vern. 187; 2 Vern. 15. β This doctrine of tacking is inconsistent with the laws of the several states which require that mortgages shall be recorded. *Grant v. United States Bank*, 1 Cain. Cas. Er. 112; *Bridger v. Cathartt*, *Hopk.* 234; 2 *Pick.* 517; 3 *Pick.* 50; *James v. Morey*, 2 *Cowen*, 246; *Burnett v. Denniston*, 5 *Johns. Ch.* 35; *Combes v. Jordan*, 3 *Bland*, 284. In the civil law the doctrine of tacking was not unknown. *Code*, 8, 27, 1; 7 *Toull. Droit Civil Français*, n. 110. But this tacking could not take place to the injury of intermediate encumbrancers. *Story*, *Eq.* § 1010; *Bouv. L. D. Tacking*. See *Jar. Eq. Jur.* b. 1, c. 2, § 1; 1 *Story*, *Eq. Jur.* § 412.g

A man mortgages the manor and rectory of D to A, and afterwards mortgages the rectory to B, without notice of the mortgage to A, and then B purchases in a precedent encumbrance on both the manor and rectory; and the question was, When B had received all the money due on the first

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security, whether he should receive any more profits of the manor, or only keep the encumbrance on foot to protect the rectory? This was argued before Sir Heneage Finch, Lord Keeper, in the presence of Wild and Twisden; and the two judges held, that B should not receive the profits of the manor after the first encumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper overruled it; for that when he had purchased the precedent encumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne encumbrancer here in a court of equity, which by no methods could be evicted at law, unless such person that seeks relief would do equity, and pay the whole money due on both securities.

Chan. Ca. 201; 3 Chan. Rep. 67; S. C., Sir Ralph Bovey v. Skipwith.

¶ But the moneys must be due to the mortgagee *in the same right*; for a mortgagee with the legal estate cannot, as against mesne encumbrancers, tack to his own mortgage another mortgage vested in him as executor. The following appears to be the only case in which this point has been discussed:—Brooke assigned to S. Barnett leasehold premises for securing 3000*l.*; and afterwards made a second mortgage to him for 500*l.* He then mortgaged the equity of redemption to Hunt, and then made a further charge to S. Barnett. He afterwards mortgaged the equity to Sadler, and ultimately to W. Barnett, the brother of S. B. W. Barnett died, and appointed S. B. his executor. S. B. died, and his executors filed a bill claiming to be paid all the advances made by S. B., and to tack the mortgage made by W. B. in preference to the mortgage of Hunt and Sadler. The Master of the Rolls said, the law of the court gave a person who had obtained a mortgage of the equity of redemption the chance of getting in the legal estate if he could, and so gaining a priority over mesne mortgages; but W. Barnett never got the legal estate, nor did any executor of him ever get it, for S. B. did not get it as his executor, but had it in his own right before W. B.'s mortgage had any existence: it was just the same as if the estates were in two different persons. The plaintiffs were only entitled to S. B.'s own mortgages.

Barnett v. Weston, 12 Ves. 130.¶

[Again, R being seised in fee, acknowledged a statute of 1000*l.* to I S in 1663, and, on the 20th of June, 1665, mortgaged the manor of A to the plaintiffs W and K for 2000*l.*, and two days afterwards mortgaged part of the same to the defendant B, and then died, leaving the defendant H his heir; B, the second mortgagee, agreed with M, another defendant, executor of I S, to put the statute in execution at his costs, and to pay M the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof by M to B. The statute was extended in August, 1672. The plaintiff's bill was, that on paying the debt on the statute, it might be set aside and assigned to them, and for a decree against H to pay or be foreclosed of redemption. One question was, Whether the plaintiffs should be admitted to set aside the extent on payment of what was due on the statute, without paying off the 2000*l.* due on the second mortgage to B, until the statute was satisfied, not according to the justice of the debt in equity, but according to the extended value? It was objected, that the defendant B had not, in his mortgage made after the plaintiffs' mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that

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the statute covered the whole ; and that, although the defendant B might, by the purchase of the statute, defend himself against the plaintiffs, as to what was in his mortgage, yet he could not as to such lands as were not therein. But the Chancellor was strongly against the plaintiffs on this point, and a question of fact arising, the case went off upon propositions.

Wyndham v. Lord Richardson, 2 Cha. Ca. 212.

And if a puisne encumbrancer or purchaser get in a satisfied judgment, or a prior statute, or judgment, or recognisance, although it be paid off, yet if he can make *use of it at law*, equity will not interfere to hinder him.

Edmunds v. Povey, 1 Vern. 187 ; 2 Ch. Ca. 208 ; Hard. 318. *Sed vide* Hard. 172, *cont.*

So, where the plaintiff was a jointress, and the defendant a mortgagee subsequent, who had gotten an assignment of a statute that was precedent to the jointure, but was satisfied, and extended it on the lands mortgaged ; the bill was to set aside the extent ; but the Master of the Rolls decreed, that it should not be set aside, but upon payment of principal, interest, and costs.

Sadler v. Bush, 2 Vern. 30.]

But if B, the second mortgagee, had notice of the mortgage of A at the time of his first lending the money, then he could not purchase in a prior encumbrance, so as to crowd out A, because he lent it on the prospect that A was first to be paid, and under that immediate expectation ; and though the estate would bear more money at the time of the loan, yet if, by prior debts appearing, or any accident, it is likely to fall short, it seems he cannot crowd out A, of whose interest he had notice, since he took the estate with his eyes open, under notice of A's interest ; and therefore, on his original taking the security, ran all the hazards of that nature ; for it is corruption in B to purchase after such notice, with an ill intention of destroying A's prior security.

Marsh v. Lea, Chan. Ca. 166 ; ¶2 Vent. 337, S. C. ; Belchier v. Butler, 1 Eden, R. 523 ; 5 Bro. P. C. 292. It seems of no consequence that the first encumbrancer, when he conveyed to the third, knew of the second. Belchier v. Butler, *supra* ; Robinson v. Davison, 1 Bro. C. C. 63 ; per Lord Eldon, 15 Ves. 335. ¶ *β* The tacking of one claim to another is never allowed to the prejudice of others. Coombes v. Jordan, 3 Bland, 284. *g*

A man mortgages lands (subject to an annuity) to A, and then mortgages the same lands to B. The mortgagor and annuitant borrow more money of A, for which the annuity is assigned, and the lands farther charged ; A shall be allowed the money if he had no notice of B's mortgage ; if he had, then only what was paid to the annuitant.

2 Chan. Ca. 20.

*β* The principle upon which courts of equity allow the tacking of mortgages, does not apply to a case where the equity of redemption belongs to different persons at the time when the mortgagee's title to both estates accrues ; therefore, where A being seised of Blackacre, mortgaged it to M, and then devised it to B in fee and died ; and B, being seised of Whiteacre, mortgaged it to N, and then devised the two estates to distinct classes of devisees and died ; and then it obtained an assignment of M's mortgage ; held, that N could not, by tacking the two mortgages together, obtain payment out of Blackacre of the balance due in respect of his own mortgage after the sale of Whiteacre.

White v. Hillacre, 3 Y. & Coll. 597. *g*

(E) Redemption and Foreclosure. (*Tacking.*)

[Where a judgment-creditor, or creditor by statute or recognisance, buys in a first mortgage, he cannot tack or unite this to his judgment, so as to gain a preference thereby; because such creditor cannot be called a purchaser, nor hath he any right to the land; he hath neither *jus in re*, nor *jus ad rem*; and therefore, though he release all his right to the land, he may extend it afterwards. All that he hath by the judgment is a lien upon the land; but it is not certain whether he ever will make use thereof; for he may recover the debt out of the goods of the conusor by *scire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Besides, the judgment-creditor doth not lend his money upon the immediate view or contemplation of the conusor's real estate; for lands afterwards purchased may be extended upon the judgment; nor is he deceived or defrauded, although the conusor of the judgment hath before mortgaged his real estate, as in the case of a mortgagee, if the mortgagor hath before mortgaged his land to another.

*Brace v. Duchess of Marlborough*, 3 P. Wms. 491; *Anon.* 2 Ves. 668; *sed vide Wright v. Pelling*, Gilb. Eq. Rep. 151, and *Proc. Ch.* 494;] [*Ex parte Knott*, 11 Ves. 619.]

A mortgaged his estate to B, and then assigned the equity of redemption to C; afterwards D obtained a judgment against A; then B the mortgagee assigns to D his mortgage; and then C tenders the money due on the mortgage to D, who had notice of the assignment of the equity of redemption, upon his purchasing in of the mortgage. It was here objected, that D having the legal estate in him by the assignment of the forfeited mortgage, and C having only an equitable interest, and not supported by the legal estate, that if C would have equity, he ought to do equity, by paying off both moneys to C. But it was answered and resolved by the court, that C should redeem, paying only the money due on the mortgage, and not what was due on the judgment; because the equity of redemption was never bound by the judgment; for the judgment was not confessed, so as to become a real lien upon the estate, at the time when the equity of redemption was conveyed away; but it only subsisted upon bond, which was a security *in personam*, not *in rem*, at the time when this equity was assigned; and therefore the judgment could never charge nor affect it; and, consequently, C purchased an estate not bound by the judgment; and, by consequence, the judgment-creditor, by purchasing in the prior mortgage, could never defeat the interest of C. It was also declared, that if a person who has a first mortgage purchase in a subsequent judgment, without the consent of the mortgagor, that a mesne mortgagee, or assignee of the equity of redemption, shall not be obliged to pay the money due on both securities, in order to redeem, because such transaction of the mortgagee is only to load the estate without the consent of the owner, and he has no prospect of bettering his own security, as in the case where the mortgagee at a third hand purchases in the first encumbrance.

*Breerton v. Jones*, June 8, 1709. *Per* Master of the Rolls, 1 Eq. Ca. Abr. 325, S. C.

Beeching made a mortgage of his estate, and became indebted to Hayward in 60*l.*, and then conveyed to Streater, another defendant, in trust to pay a debt to Streater, and then all his other debts of average; then Streater tendered the money to the mortgagee, which he refused, and afterwards assigned the mortgage to Hayward; and then Hayward obtained judgment against Beeching, on his bond of 60*l.*, and then Streater sold to the plaintiffs, who not having paid their purchase-money, preferred their bill against

(E) Redemption and Foreclosure. (*Tacking.*)

the mortgagees and Hayward to redeem. The Lord Keeper ordered, that the plaintiffs should redeem Hayward's mortgage, and deduct their costs out of the mortgage-money, and that the judgment should be paid but in proportion; for though Hayward had a title at law, and it was insisted, that his judgment would affect the resulting equity in Beeching, if there was more than sufficient to pay his debts; and none of the creditors of Beeching were made parties to the suit; yet the Lord Keeper thought, that the conveyance made for the payment of all Beeching's debts was a good consideration, and that being prior to the judgment, the subsequent judgment could not affect the estate; and though no creditors of Beeching's were made parties, yet they might be brought in before the master.

*Stephenson v. Hayward*, Feb. 9, 1710, *per* Lord Keeper Harcourt, Prec. Ch. 310.

[But where A, the plaintiff, had lent money on several notes of different dates, each of them in words to this effect: "Received of A. — £., to be secured on mortgage of my Stokehall estate;" and the drawer had, previously to his drawing these notes, made a mortgage of his estate to the defendant; and A, to cover the sums lent on the notes, bought in a mortgage which was made prior to the defendant's; Lord Hardwicke was of opinion, that A should thereby protect himself against the defendant's mortgage; and should be paid the money lent upon the notes, as well as what was due to him upon the assignment of the first mortgage.

*Matthew v. Cartwright*, 2 Atk. 347. [This case is distinguishable from the common case of a judgment-creditor purchasing a prior encumbrance to protect himself, which he cannot do; for this was a case of equitable mortgage. See *Powell*, 522 a, (6th ed.)]

A prior mortgage purchased in, will be no protection to a puisne mortgagee, unless it be forfeited; for, until then, the estate remains, as it was at common law, redeemable upon performance of the condition stipulated.

*Hitchcock et al. v. Sedgwick et al.*, 2 Vern. 155.

And a puisne mortgagee, who purchaseth in a prior security to protect his own, shall not only hold it until he be paid his debt, and reimbursed the money advanced by him to purchase it; but until he has received all the money, and arrears of interest, due on the security bought in, as well as upon his own.

*Darcy v. Hale*, 1 Vern. 49.

And as a puisne mortgagee may tack a prior encumbrance, that brings with it the legal estate, to his own, and thereby protect himself against intervening charges thereon; so, a mortgagee eigne, having the legal estate, may tack a subsequent sum advanced by him upon the former security (a) to his prior mortgage, and thereby protect himself against mesne encumbrances.

*Goddard v. Camplin*, 1 Ch. Ca. 119. [(a) But not a simple contract debt. *Ex parte Hooper*, 1 Meriv. 7.]

Thus, where A had an annuity charged on the manor of S, and B an estate therein liable to the annuity, and C an interest subsequent to both by mortgage; B having no notice of C's interest, treated with him in the reversion in fee, who desired to borrow money of him, and thereupon purchased A's interest, and for that, and by way of money lent to the reversioner, paid 900*l.*, but there was no more than 500*l.* due to A; C exhibited his bill against A and B, to redeem them on payment of their debts; the question was, Whether C should pay B any more than the mortgage-money he had originally lent, and the 500*l.* paid by him, which was due to A? And it was decreed, that he should pay the whole 900*l.* advanced.

*Blackstone v. Moreland*, 2 Ch. Ca. 20.



(E) Redemption and Foreclosure. (*Tacking.*)

So, if there be first and second mortgagee, and the first lend money after the last mortgage made, taking a *judgment* as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he hath the legal estate and the judgment, *which*, though it passeth no interest, presently, in the land, operates as a lien.

Sheppard v. Titley, 2 Atk. 352, 4th resolution in Brace v. Duchess of Marlborough, 2 P. Wms. 494; 2 Ves. 662.

But the farther sum advanced must be to one who has a right to charge the estate in question. Thus, I C, the grandfather of C, made a mortgage of lands in fee to H, and then having two sons, A and B, devised the equity of redemption to his youngest son B, and his heirs, and died; B entered into the mortgaged lands, and enjoyed the same two years, and then died, leaving a son an infant. After B's death, his elder brother A entered on these lands, and having occasion for money, joined with the mortgagee in an assignment of the mortgage to another person, of whom he borrowed a farther sum, which the assignee advanced, having no notice of the will of John Cooper. Then the heir of B came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the first mortgage. And on his part it was insisted, that the assignee could be in no better condition than the mortgagee, and that, if there had been twenty assignments for more money, if the mortgagor or he who legally represented him had not joined, he should not be barred, but ought to be relieved. On the other side it was contended, that the assignee was a purchaser for a valuable consideration without notice of this encumbrance by the will, and that he had a good title, having taken an assignment from the mortgagee, wherein the visible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal sum and interest. But the court was of opinion, and decreed that the heir should be let into the equity of redemption upon the foot of the first mortgage.

Cooper v. Cooper, Nelson's Rep. 153.

And where A had a prior judgment, and a mortgage likewise on the estate of B: and a subsequent judgment-creditor, but prior in time to the mortgage, brought a bill in Chancery, praying a sale of the mortgagor's estate, who was likewise willing and desirous to sell; *per curiam*, here A is not a subsequent encumbrancer buying in a prior, but is the first of the encumbrancers who has advanced more money on a second encumbrance. Where the *first encumbrancer* by judgment has likewise a mortgage upon the estate, notwithstanding there is another judgment, prior in time to the mortgage, yet, if the mortgagee had no notice of such judgment, the creditor upon the second judgment shall not come into a court of equity, and pray a sale of the estate so mortgaged, without paying off the principal and interest, both of the first judgment and the mortgage; for it would be very hard if the defendant should be in a worse condition, with a prior encumbrance in his favour, than a mortgagee without notice of a prior judgment would be.

Smithson v. Thompson, 1 Atk. 520.]

If a man lends 600*l.* on a mortgage, and afterwards, discovering that the estate is pre-mortgaged to J S, he gets in an old, satisfied encumbrance, and bring his bill against J S to redeem or be foreclosed, he need not prove the actual payment of any money for such precedent encumbrance, the having the deed or acquittance being sufficient.

Holt v. Mill, 2 Vern. 279.

(E) Redemption and Foreclosure. (*Tacking—Notice.*)

¶ The principle upon which a court of equity allows the tacking of mortgages, does not apply to a case where the equity of redemption belongs to different persons at the time when the mortgagee's title to both estates accrues.

*White v. Hillacre*, 3 Y. & Coll. 597.

The tacking of one mortgage to another is never allowed to the prejudice of third persons.

*Coombes v. Jordan*, 3 Bland, 284; *Colquhoun v. Atkinson*, 6 Munf. 550; *Hughes v. Worley*, 1 Bibb, 200; *James v. Morey*, 2 Cowen, 246; *Shirras v. Caig*, 7 Cranch, 34; *Burnett v. Denniston*, 5 Johns. Ch. 35.

When advances are made by the mortgagee in continuation of those provided for in the mortgage, they are presumed, *prima facie*, to be made on its faith; and, if no other encumbrancer resist it, they will be tacked to it.

*Downing v. Palmateer*, 1 Monr. 69.g

{ A mortgagee with the legal estate cannot, as against mesne encumbrancers, tack to his mortgage a subsequent mortgage of the equity of redemption coming to him as executor of the subsequent mortgagee.

12 Ves. J. 130, *Barnett v. Weston*. }

[The law is the same, although the encumbrance, set up as a protection, be obtained by fraudulent means; as, where one, being a purchaser, came into a man's study, and there laid hand on a statute that would have fallen on his estate, and put it in his pocket; in that case, he having obtained an advantage at law, the court would not take it from him, though procured so unfairly, and by so ill a practice; *sed quære*?

2 Vern. 159; *Siddon v. Charnell*, Bunb. 298; *Sherley v. Fag*, case cited, 1 Vern. 52, 53; 2 Vern. 58, reported 1 Ch. Ca. 68; *sed contra* *Gilb. lex prætoria*, 248.

But, where the prior encumbrance taken in is deficient in those requisites which are necessary to give it legal efficacy, no protection can be derived from it. As, if a recognisance, bought in, hath not been enrolled in proper time. And though the court may, on application, interpose, and, by their special order, supply the defect as to persons who come *subsequent* to such interposition, yet it will not over-reach an intermediate encumbrancer.

*Fothergill v. Kendrick*, 2 Vern. 334; *Bothomley v. Lord Fairfax*, 1 P. Wms. 340.

So, if a judgment be not docketed within the time limited by the statute 4 & 5 W. & M. c. 20, it will not protect a puisne encumbrancer, although the eigne encumbrancer hath actually notice of it at the time of making the mortgage. Thus, where judgment was signed in June, 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until January, 1730; the Master of the Rolls held, that the docket was not good, being made after the time limited by the statute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the statute being express, that judgments not docketed shall lose their preference as to *purchasers and mortgagees*.(a)

*Forshall v. Coles*, 7 Vin. Abr. 54, P. C. 6; S. C. 2 Eq. Ca. Abr. 592, 598.

[(a) But it has been decided by *Davis v. Strathmore*, 16 Ves. 419, that a purchaser is bound by notice of a judgment though not docketed.]

But this exception, as to judgments not docketed, is confined to cases where they are set up against purchasers or mortgagees, or heirs, or executors, or administrators in the administration of the effects of those of whom they are representatives.

*Robinson v. Harrington*, 1 Pow. Mortg. 415.]

(E) Redemption and Foreclosure. (*Priority of Encumbrances.*)

If a prior mortgage or statute be bought in, pending a bill brought by A against the mortgagor and B, who buys in such precedent statute or mortgage, to foreclose; though this purchase be *pendente lite*, yet it will protect B, he being at liberty to do what he can for his own security.

Hawkins v. Taylor and Leigh, 2 Vern. 29; Farmer v. Richmond, Ibid. 81, S. P.

[The plaintiff (after a decree had been made in a cause in which he had been a party with other creditors, and the Master had been directed to inquire into the priority of their demands) bought in a judgment given in 1694, and made claim before the Master to have it tacked to his mortgage, and thereby to be paid before the defendants; as to which the Master refused to make any report: whereupon the plaintiff filed his bill, and one question was, Whether he could tack the encumbrance bought in after the decree to his mortgage? Lord Chancellor Hardwicke, as to this part of the case, said that there was no case wherein it had been determined that a puisne encumbrancer, a party in a cause, and a decree made in that cause for satisfaction of encumbrancers, according to their respective priorities, having taken in a prior to tack to his puisne encumbrance, should be allowed to make use of it in any other shape than that in which the original encumbrancer might use it, had no such purchase been made. He thought it would be most mischievous and pernicious, if the court should allow the doctrine of tacking to be carried to that extent. First, taking it upon the terms of the decree; all those decrees where there were several encumbrances before the court, a sale directed, and every thing necessary to clear the estate, in order to that sale, proceeded on the foundation *that the rights of the parties* were to be taken as they stood at the time of the decree; and therefore they directed an inquiry into the priorities. What, then, were those priorities? Why, such as they stood at the time of the decree; not that afterwards the priority should be varied. The sense, reason, and justice of the case required it should be so; for otherwise, if, where an encumbrancer on an estate which was affected with several charges, brought a bill for satisfaction thereof, and there were all proper parties and a decree for it, as between himself and the owner of the equity of redemption, (some of the encumbrances being prior, others posterior to his,) one of those defendants, who happened to be prior to him, was allowed to convey to another defendant, who was puisne to him, it would shut out the plaintiff after the decree made, at which time the rights were considered. What would be the consequence? Nothing could lay a foundation for greater collusion and contrivance between the parties to exclude each other than such a liberty would, and that to the great deceit of the plaintiff; for then a man would lose his costs by such a proceeding, although he had a right to his debt, principal, interest, and costs, according to the respective priorities; that was the direction of this decree; and there was a sufficient fund, according to the then right of the plaintiff, to pay all that was due; but if this were permitted, after a decree was made, two of these defendants might, by a collusion, give a third encumbrancer more than his debt, and it would be worth while to do so, in order to exclude another, who happened to be a second encumbrancer. It would be carrying securities to market in that manner, whereby the purchaser of them should not only stand in the place of the party selling, but would acquire a new equity, which it would be mischievous to allow; and therefore his lordship said, he never was clearer in opinion than upon this part of the case as to the general right.

Wortley v. Birkhead, 2 Ves. 571; 3 Atk. 809, S. C.; *Ex parte Knott*, 11 Ves. 619, Redesdale's Treat. Pl. 168, (3d edit.)

(E) Redemption and Foreclosure. (*Priority of Encumbrances.*)

So, where S, a puisne encumbrancer, after the bill brought, and after the first decree made, and, in truth, after the report, got an assignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the court held, that the assignment obtained by him being after the decree made, he should not profit by it or change the order of payment, but should come in according to the time of his own encumbrance, without regard to the old judgment and mortgage.

Bristol v. Hungerford, 2 Vern. 524, 525; 1 Eq. Ca. Abr. 142.¶

And the law is the same as to purchasers, encumbrancers who are not parties in the suit, *but who could come in under the decree*; for they must come in upon, and submit to, the terms of that decree, though no parties.

2 Ves. 575; 11 Ves. 619.¶

¶In a case where a third mortgagee had obtained a transfer of a first mortgage, subsequently to a commission of bankrupt against the mortgagor, it was contended by the assignees, that *the commission* had the same effect as a decree to settle priorities, after which there can be no tacking. But the Lord Chancellor held that it was not so; that the commission was not a judgment for creditors, but only a conveyance for the security of creditors.

*Ex parte* Knott, 11 Ves. 618.

In this case another important question was raised, viz.: What was the situation of the assignees of the bankrupt against the third mortgagee, claiming under one mortgage since the act of bankruptcy and a transfer of another subsequent to the commission? The mortgagee insisted that the assignees could not stand in a better situation than the bankrupt, and consequently could only redeem by paying all the money advanced on the faith of the land. The assignees, on the other hand, contended that the assignment was a conveyance for the benefit of creditors, and placed them in the same situation as if the debtor had not been bankrupt, but had made a conveyance for the benefit of his creditors. The point was not decided, an issue being directed as to the priority of the act of bankruptcy on the third mortgage.¶

A third mortgagee may purchase in a first mortgage, and defend himself thereby, notwithstanding a suit be depending between the respective mortgagees.

Thus, where the second mortgagee filed his bill against the mortgagor, first and third mortgagees to be let in to pay off the first mortgage, and that then the estate should be sold, his own mortgage paid, and the third be satisfied out of the remainder; and pending the suit the third mortgagee bought in the first mortgage: it was determined by this he had gained a priority, and should be paid his whole money before the second mortgage.

Robinson v. Davison et al., 1 Br. Ch. R. 63.

¶In a case before Lord Keeper Henley, in which a similar point was determined, that judge thus explained the principles of the doctrine:—The rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it is by the lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and therefore when that danger is first discovered to him, (whether it be by a suit in equity, or by any extra-judicial means,) as the honesty of the debt is not affected by the discovery, so the right of protecting that debt, and the

(E) Redemption and Foreclosure. (*Notice—Lis pendens.*)

efficacy of such protection, are not prejudiced. Hence arose the rule which permitted the subsequent encumbrancers to purchase *pendente lite*.

*Belchier v. Butler, Renforth v. Ironside, 1 Eden, 530.*]

However, in many cases, a suit pending in equity against land is a bar to alienation; for *pendente lite nihil innovetur*; therefore the vendor of lands, pending a suit in equity against them, can give no title but what will be subject to its issue; but it is the pendency of the suit that creates the notice, for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there; and to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest. J F having only one daughter, and desiring to keep part of his estate in his name, by will made in 1684, devised a messuage to F his near kinsman, in tail-male, with remainder over, and gave his lands in Sussex to his daughter, who married E; they, with C, were supposed to have destroyed the will after the death of the testator. F brought his bill against E and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will against them, and all claiming under them. The estate devised to F having been mortgaged by the testator, prior to his will to B, for 100*l.*, N pending the suit bought in B's mortgage, and purchased the equity of redemption from E and his wife. N was served with the former decree, and appeared, and was examined, and set out his title under this mortgage, whereupon F was put to bring his bill to redeem. N by answer alleged, that although he had been informed before his purchase that it was pretended there had been such will made, yet, upon inquiry, he had been assured and satisfied that it was destroyed by the testator in his lifetime, and therefore he proceeded in his purchase, and insisted, that the former decree, to which he was no party, was unjust, in decreeing the lands to be enjoyed according to the will; but in regard he purchased *pendente lite*, and with notice that there was a will, the court would not admit him to examine the justice of the former decree, or to try at law whether such will was cancelled or destroyed by the testator, but declared he should be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

Vide *Worsley v. Earl of Scarborough, 3 Atk. 392*; *Finch v. Newnham, 2 Vern. 217*; and vide *Flemming v. Page, Finch. 320*; and vide *Herbert's case, 3 P. Wms. 116*, this doctrine of notice extended to a criminal case.

|| On the same principle of the *lis pendens* being notice, a decree of foreclosure is held binding on all creditors, by mortgage or judgment, and assignees of the equity of redemption, subsequent to the filing the bill. In a case where it was decided that mortgagees of the equity of redemption, pending a suit for foreclosure, were bound by the decree, and that it was not necessary for the plaintiff to make them parties, the Master of the Rolls said, that the litigating parties were exempted from the necessity of taking any notice of a title acquired pending the suit. As to them it was as if no such title existed. The rule might sometimes operate with hardship upon those who purchased without actual notice, yet general convenience required its adoption; and a mortgage taken *pendente lite* could not be exempted from its operation. And the rule is the same although the suit abate after the making the mortgages *pendente lite*, and a bill of revivor be filed to which these mortgagees are not made parties.

Bishop of Winchester v. Paine, 11 Ves. 197; and see *Bishop of Winchester v. Beaver, 3 Ves. 315*; *Metcalf v. Pulvertoft, 2 Ves. & B. 207*; *Gaskell v. Durdin, Vol. VII.—15*.

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2 Ball & B. 167; Moore v. M'Namara, 2 Ball & B. 186; and see 4 Dow. P. C. 498; Powell, 547 a, note (R), (6th edit.)]

A and B were partners; A died having made his will, and devised to his executors and their heirs "all his real and personal estate not by his will otherwise disposed of, in trust that they should, by charging, leasing, or selling his estates, or any of them, raise money for the payment of all his debts; and what should remain, he directed to be divided into equal portions, share and share alike, between his five children, and left it to his executors to make proper allowances for their maintenance, until there should be a distribution made of his estates." A, amongst other things, had a mortgage of 3500*l*. In a cause between the executor of B and A's executors, the mortgage-deed was directed to be left in the hands of a master of Chancery, till the partnership account should be finally adjusted. Afterwards A's executors conveyed the mortgage to Master Bennet, as security for one of the executors, on his appointment to be receiver of another person's estate. And one argument used by the children of A in a suit against the holders of the mortgage, by way of security for the due discharge of the receivership, was, that there was a suit at the time of the assignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *lile pendente*. But Lord Hardwicke said, that he did not see how this *lis pendens* could affect this assignment, unless it had been determined that this was the mortgage of B the partner of A, and belonged to his creditors, who were the plaintiffs in that cause. But that, as it was therein determined to be A's estate, there was an end of that objection.

Mead v. Lord Orrery, 3 Atk. 236; Id. 392, S. P.

But, in case of a real purchaser for a valuable consideration, *pendente lite*, the plaintiff will be held to strict proof of his own title. Thus, a bill was brought by S against C to have the benefit of a decree, obtained against L, for the recovery of a leasehold estate held of the dean and chapter of Saint Paul's; C being a purchaser of this estate from L *pendente lite*, but, as was proved, for the full value, and without any notice of S's claim, or any actual notice of the suit. For the plaintiff, it was insisted, that this purchase, made *pendente lite*, was to be considered as made under an implied and constructive notice. But the court said, that although, where there was a conveyance made *pendente lite*, without any valuable consideration, and to avoid and elude a decree, it ought to be highly discountenanced; and, though the alienation were for ever so good a consideration, the purchase, if made *pendente lite*, was nevertheless to be set aside, yet, where there was a real and fair purchaser, without notice, it was a very hard case, especially in a court of equity; and there being some defect in part of the proof in de-raigning the title of S, leave to amend, or make any new proof after publication, was refused, and the bill dismissed.(a)

Sorrel v. Carpenter, 2 P. Wms. 482. (a) There appears to have been an order to amend the bill in Trin. term, 1728 (the term of which the reporter makes the decision to have been); Reg. Lib. B. 1727, fol. 453; and an order of dismissal in the Mich. term following. Reg. Lib. B. 1728, fol. 18. In this case the Chancellor observed, that it was a difficult matter to search for bills in equity, or to get notice of them; many such being, after filing, kept in the six clerk's desk; and that though the court would oblige all persons to take notice of its decrees as much as of judgment at law, yet there did not seem to be the same reason for obliging people to take notice of the filing of a bill. Vide 3 Atk. 392.

And if a purchase or mortgage be made, pending a bill, to perpetuate the testimony of witnesses to a will of land, the proceedings may be read against

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a purchaser or mortgagee, during the suit, although he hath not notice either express or implied.

Garth v. Crawford, Barnard. Ch. Rep. 450 ; 2 Atk. 473, S. C. by the name of Garth v. Ward.

But, in general, a bill that cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser claiming under one of the parties, after filing the bill.

Barnard. Ch. Rep. 454 ; 2 Eq. Ca. Abr. 687, 13.

And it seems, that a decree in a court of equity, for money, does not bind a purchaser for a valuable consideration, without notice thereof, any more than a judgment at law ; for a decree is not of superior force to a judgment ; nay, its effect is inferior ; and where it is said a decree is equal to a judgment, or to be paid equally therewith, this must be intended only out of the personal estate ; for a decree for a debt does not bind the real estate, it acting only *in personam*, not *in rem* ; and the remedy upon a decree to affect the land, is only for a contempt, whereupon the party proceeds to a sequestration, and that is but a personal process, as appears by its failing and abating by the death of the party.

Searle v. Lund, 2 Vern. 88 ; 1 Eq. Abr. 332, 334 ; 2 Ch. Ca. 48 ; and vide 3 P. Wms. 401 ; and Ca. temp. Talb. 217 ; 2 P. Wms. 622 ; 1 Ves. 496.]

But where A made a mortgage to B, and afterwards a commission of bankruptcy was taken out against him, and the commissioners made an assignment of his estate, and then C lent the bankrupt 2000*l.* on a second mortgage, having no notice of the bankruptcy, though he afterwards got in the first mortgage ; yet it was held by two lords commissioners against one, that this prior mortgage should not protect the mortgage subsequent to the bankruptcy ; for every one is bound to take notice of a commission of bankruptcy.

Hitchcock v. Sedgwick, 2 Vern. 157, 160.

¶ But this decree was afterwards reversed in the House of Lords, and the money advanced *subsequent* to the commission was ordered to be paid to the mortgagee ; which was deciding that a commission of bankruptcy is not of itself notice to a purchaser, and that advances made without notice subsequently to the commission may be tacked to the prior mortgage. However, notwithstanding this decision, it is perhaps not fully settled whether a *commission* is notice or not, so as to prevent tacking subsequent loans. It seems, however, that it is not.

2 Vernon, 161 n. (1), (last edit.) Vide Coote on Mortg. 430 ; Powell, 551 a ; Sugden, V. & P. 722, (6th edit.) ; Sowerby v. Brooks, 4 Barn. & A. 523.

It has been doubted, whether an act of bankruptcy is not of itself notice ; and it was stated by Lord Redesdale in *Latouche v. Dunsany*, (1 Schol. & Lefroy's R.) that it was the constant practice for the assignees to compel a redemption on payment only of what was advanced before the *bankruptcy*, meaning the *act* of bankruptcy ; and Lord Erskine decided in a subsequent case, that the act of bankruptcy was notice so as to prevent a mortgagee tacking advances subsequent to it. This decision of Lord Erskine, it must be observed, directly overruled the case of *Collet v. De Gols*, decided by Lord Talbot (For. 70, Co. B. L. 1, 300) ; and Lord Erskine considered that Lord Redesdale in the case above mentioned, and Lord Eldon in that of *Ex parte Knott*, 11 Ves. 609, had both expressed opinions against Lord Talbot's decision. But the report of Lord Eldon's judgment in *Ex parte*

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Knott is manifestly confused and inaccurate, and does not appear clearly contradictory of the doctrine in *Collet v. De Gols*; and it appears now to be the better opinion that that case remains established law, and that the act of bankruptcy is *not* notice so as to prevent tacking subsequent loans.

*Ex parte Herbert*, 15 Ves. 183. Vide 11 Ves. 609; *Sugd. V. & P.* 720, (6th edit.); *Coote*, 429; *Powell*, 551 a.]]

And though a purchaser or mortgagee may buy an encumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by taking a conveyance from a trustee after he had notice of the trust; for by taking such conveyance, he becomes the trustee himself.

*Saunders v. Dehew*, 2 Vern. 271; [and see *Pearce v. Newlyn*, 3 Madd. 189.]]

[Even a fine levied by a purchaser for full consideration, *with notice of a trust*, to strengthen his estate, will not bind the *cestui que trust*, although there be five years' non-claim; for he, having purchased with notice, is but a trustee, notwithstanding any consideration paid by him; and the estate not being displaced, the fine cannot bar; but a fine and non-claim will be a bar in equity, if a purchaser hath not notice.

*Bovey v. Smith*, 1 Vern. 149; 2 Ch. Ca. 125; 2 Vern. 194, 1 Atk. 475.

And where the plaintiff's bill was to be relieved upon a trust, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the trust was had, *and that at or before his taking the said conveyance*, he had notice of the said trust for the plaintiff; the defendant, by way of answer, denied that he had any notice of the trust *at the time of his purchase or contract*, and pleaded that he was a purchaser for a valuable consideration; it was insisted that the point of notice was not well answered, in that the defendant denied notice *at the time of the purchase only*; for the word *purchase* might be understood to mean the time when the contract for the purchase was made, and it might be, he had no notice then, and might have notice after, before, or at the sealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was overruled.

*More v. Mayhow*, 1 Ch. Ca. 34; *Attorney-General v. Gower et al.*, 2 Eq. Ca. Abr. 685, 11; and *Wigg v. Wigg*, 1 Atk. 384.

But if *cestui que trust*, tenant in tail, be the mortgagor, and join with the trustees in making the conveyance, it will be good and valid; they being considered as trustees purely for the tenant in tail to preserve his estate *only*, and not to stand in opposition to him, for the sake of those who are to come after him.

*Elle v. Osborne*, 2 Vern. 754; 1 Eq. Ca. Abr. 385, 3.

Previous to the case of *Willoughby and Willoughby*, a motion generally prevailed, that although a satisfied term resulting by operation of law might, if got in, be made use of to protect a purchaser, a term once assigned to attend the inheritance could not be so applied: for it could not inure to any other purpose than that prescribed, unless severed again by the owner of that inheritance; but in that case Lord Hardwicke explained this distinction, observing that its applicability to such purpose was an unavoidable consequence of the rule, that "*a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*" The facts of the case were as follow:—George Willoughby, being seised in fee of an estate in W, (subject to a mortgage-term for 500 years,) by articles dated 12th November, 1717, made



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upon his marriage, agrees to settle this estate to the use of himself for life, and afterwards to the intent that his wife should, out of the rents, &c., of part, take an annuity of 250*l.* by way of jointure; with remainder, as to the whole estate, to the use of the first and other sons of the marriage in tail-male; with remainder to George Willoughby in fee, with a power for the said George to charge the estate, by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the estate was subject to a mortgage for a term of years, as mentioned above, which being satisfied, the said term was by indenture, dated 17th August, 1718, assigned to Shelling and Popham, and their executors, *upon trust* for G W, his heirs and assigns, *to attend the inheritance*. A settlement was made of the estate 14th March, 1718, pursuant to the articles: 14th March, 1750, George Willoughby made his will, and thereby executed the power reserved to him, by charging the estate with 3000*l.* for the portions of his younger children, and afterwards died, leaving Jane his widow, Henry his eldest son, three daughters, and a younger son George. Henry, having attained his age of twenty-one years, and being tenant in tail, suffered a recovery, and limited the estate to trustees in fee, to the use of such person and persons, and for such estate as he should by deed appoint. Henry, in pursuance of his power, by indenture dated in June, 1751, for securing 870*l.* which he had borrowed of Jane his mother, declared the trustees should stand seised, and the estate be charged with the payment of this sum and interest. The term of 500 years was still standing out in Shelling and Popham. Afterwards Henry borrowed 800*l.* of the defendant Cripps; and for securing this with interest, by indenture of lease and release, dated 14th and 15th June, 1752, he conveyed the estate in mortgage to Cripps and his heirs. The same day Shelling, the surviving trustee, assigns the term of 500 years to Boot, upon trust, in the first place, to protect the estate limited to Cripps and his heirs from mesne encumbrances, and, *subject thereto, to attend the inheritance*. It appeared upon the evidence, that Cripps had full notice of the articles and settlement, and that, notwithstanding, in the release above, he took a covenant from Henry that the estate was free from all encumbrances except the 500 years' term and the several mesne assignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by Jane the mother, and the younger children, for payment (by sale of the estate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother; and that then the rest of the encumbrances might be paid, according to their order and priority. The defendant Cripps insisted that, as the legal estate was in Boot, his trustee, and as he was a purchaser for a valuable consideration and without notice of the first mortgage, he was entitled to be preferred in payment of his mortgage upon this principle, that he had both *law* and *equity* on his side, and the mother *only* equity.

Willoughby v. Willoughby, in Chan. June 19, 1756; [S. C. 1 Term Rep. 763, Powell, 465 a. Mr. Butler, arg. 2 Jac. & Walk. 52, termed this case the Magna Charta of this branch of the law; and see more as to attendant terms, and the assignment of them, Butl. Co. Lit. 290 b, n. (1), § 13, Sugden, V. & P. ch. 8, § 2, p. 372, (6th edit.); Powell, 477, note (A), (6th edit.)]

Lord Hardwicke was of opinion, that supposing Cripps to have no notice of the jointure, portions or other encumbrances, he would *in equity be entitled* to the *benefit* of this term.

Jones, seised in fee of several estates, demised the same, in 1761, to

*T. Redemption and Foreclosure. (Receipt of Outstanding Term.)*

**ANNO.** for nine hundred and ninety-nine years, by way of mortgage. Afterwards in 1768, this term was assigned to Lockwood in trust for Jones, as to part of the lands, and in the mean time to attend the inheritance; in 1771, Jones mortgaged to Morgan, and in July, 1769, to David. Both these mortgages were in fee. In December, 1769, Jones and Lockwood assigned the last-mentioned lands to Moreland, his executors, &c., for the remainder of the term of nine hundred and ninety-nine years, in trust for Sprigg, in securing 11,000*l.* lent by Sprigg to Jones. Afterwards, Jones, by indentures of lease and release, mortgaged the same estates in fee to Sprigg, in securing the 11,000*l.* On the mortgage to Sprigg, all proper securities were made in his part for encumbrances, and he had all the title-deeds that could be found delivered to him at the time he advanced his money, except the demise of the term for nine hundred and ninety-nine years, and the assignments of it, which were kept in the hands of Lockwood, in mortgaging only of continuing other premises in mortgage to Lockwood, and which were not included in the mortgage to Sprigg, nor assigned to Moreland, his trustee, but counterparts of them were then delivered to Sprigg. On these facts the question in an ejectment was, Whether Morgan and David or Sprigg, should be preferred?

*Gardner v. Morgan*; 2 Term R. 755. [Overruled, *Bailey v. Fermor*, 9 Price, 266.]

On the part of Morgan and David it was contended, that this term must be considered as attaching on the inheritance; and, consequently, at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance but by their consent. That if previous to the conveyance to Sprigg, in 1769, Morgan and David had brought ejections upon their mortgages, neither Jones nor Lockwood, his trustee, could have set up his term as a bar to their ejections; then if Jones himself could not set up the term, it was absurd to say that those who claimed under him might, for they could not claim a greater estate than he had. Then Jones, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land. *See per Ashurst, J.* no man ought to be so absurd as to make a purchase without looking at the title-deeds: if he is, he must take the consequence of his own negligence. If the first mortgagee had an ordinary precaution, he must have known that this term was then outstanding. And if he did know of it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the fraud; and Sprigg, who has got the legal estate, must be preferred.

Where A, copyholder in fee, mortgaged to J S who was admitted by B, the steward of the manor; and afterwards A made a second mortgage to C, who was also admitted by B, and then a mortgage to B, who bought in J S's security; it was decreed, that B should not postpone C; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor when C was admitted, must know or have notice of the mesne mortgage to C.

*Brothers v. Bence*, Fitzgib. Rep. 118; 9 Eq. Ca. Abr. 615, 11. [A purchaser of copyhold is affected with notice of the contents of the court-rolls as far back as a search is necessary for the security of his title. *Pearce v. Newlyn*, 3 Madd. R. 188; *see vide*

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Sir E. Sugden's objections to this decision, Sugd. V. & P. 729, (6th edit.) and 18 Ves. 462.]

Where a purchaser *cannot make out a title* but by a *deed*, which leads him to a fact material to it; he will not be deemed a purchaser without notice of that fact, but will be presumed cognisant thereof; for it is deemed gross neglect that he sought not after it.

2 Ch. Ca. 246; Gilb. Rep. Eq. 8; 1 Ch. Ca. 291; Dunch v. Kent, 1 Vern. 319.

Thus, where B devised to J in tail-male, and if he died without issue male, to Y in tail-male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and Y afterwards levied a fine to the use of him and his heirs, (on which was five years non-claim,) and then granted a rent-charge of 100*l.* *per annum* to S, and mortgaged the premises to L; the court held the fine and non-claim was no bar to the legatees; for Y having no title but under the will, it was implied notice to all purchasers under him.

Drapers' Company v. Yardley et al., 2 Vern. 602.

So, where an annuity was granted to A by the crown, by patent issuable out of the excise upon special trust, that all such of the creditors of B as would come in *within a twelvemonth*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and A, after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from B, but were in truth for A's own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration; it was held, that although all the creditors of A did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of A came in under the letters-patent, in which the trust was mentioned, and ought to have taken notice of it at their peril.

Dunch v. Kent, 1 Vern. 260, 319.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it. As, if A makes a conveyance to B, with power of revocation by will, and afterwards limits other uses; if B disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser but by the conveyance which contains the power of revocation.

Moore v. Bennett, 2 Ch. Ca. 246; [and see Coppin v. Fernyhough, 2 Bro. C. C. 291; Pearson v. Morgan, Ibid. 388.]

But in the case of Bovey v. Smith, a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for many years, after a fine, and where there was *room to presume* that other trusts were appointed. In that case B, the mother of A, being in Holland, and having a separate estate, about forty years previous to the time of filing the bill, made her will in Dutch, and thereby devised houses to W, her husband's son by a former wife, and to other trustees, in trust for her four daughters and their children, and such of their children as should be alive at the last, and afterwards declared the trust of all her estate, thereby undisposed of, to be for her and her heirs. The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance in 1652, for a good consideration, and distributed the money arising from the sale equally amongst them. A was

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privity to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards, W, the trustee, for a full consideration, purchased them back to himself and his heirs. Then A having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against S, who now stood in the place of W, the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.—One point argued was, that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which the trust was created, and every man that had notice of the will must, at his peril, take notice of the operation and construction of the law upon it. But the Lord Keeper said, this was an application after one-and-thirty years' possession, to affect an estate with a trust, notwithstanding a release and fine, and *that* upon a supposal that B had made no other appointment, (as she had power to do by the deed,) *and* which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal, that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between the children and issue was nice, and the question was, Who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his lordship was not satisfied he could deserve it for him, and the bill was dismissed.

*Hoover v. Smith*, 1 Vern. 84, 144; 2 Ch. Ca. 124, S. C.; 11 Atk. 475; 1 Eq. Ca. Ab. 207.]

No, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor, for he will not, in favour of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the deviser; because, whoever takes any thing from an executor, must always do it with notice of a will; and therefore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets, when he is not entitled to have the vouchers for that purpose. Thus, M having a mortgage of 3500*l.*, made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executor in trust, in the first place by charging, leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son, I M, and another person, executors, and died, leaving his widow and five children; and after payment of all M's debts, a large surplus remained to be divided. I M having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of E, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.*, and that the same was the proper money of I M, and assigning the mortgage and all due thereon to B, his heirs and assigns, with a proviso to be void, if I M faithfully accounted with B for what he should receive from the estate of E. I M afterwards died intestate, without accounting with B, and

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greatly indebted to the estate of E. A bill was then filed by the plaintiffs, two of the children of M, against the defendants, the representatives of E, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, Whether the plaintiffs, as residuary legatees of M, were entitled to be relieved against the assignment of the mortgage, and to have an account; or, whether the representatives of E were entitled to retain the assignment? And this turned upon the point, Whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of the younger children? And the court held, the bare point of notice of the will, in this case, was not sufficient.

1 Ves. 173; Mead v. Ld. Orrery, 3 Atk. 236, July 19, 1745; and see Ewer v. Corbett, 2 P. Wms. 148; Buring v. Stonard, Id. 150.

So, where an executor assigned over a mortgage term of his testator to A as a satisfaction of a debt due to A from himself; it was objected, in favour of the daughters of the testator, who were creditors under a marriage-settlement, that the assignees took this assignment with notice that it was the testamentary assets of the testator. But the court held the alienation to be good.

Nugent v. Gifford, 1 Atk. 463, 1738; S. C. 2 Ves. 269; Ewer v. Corbett, 2 P. Wms. 149; Burton v. Stonard, 2 P. Wms. 150. ¶ See Whale v. Booth, 4 Term R. 625, note a, and Lord Eldon's observations, 14 Ves. 953; and see 17 Ves. 163; Powell, 569 b, note (O).]

{And leasehold estates specifically bequeathed to an executor being assigned by him as a security for his own debt, the assignment, as no collusion appeared, was established against a creditor of the testator.

8 Ves. J. 209, Taylor v. Hawkins.}

But where H, being indebted to C on bond, died possessed of a great personal estate, and made W executor and devisee, who wasted the estate; D having notice of C's debt, bought a leasehold estate of W by discounting 200*l.* due from H, 550*l.* due from W, and by payment of 150*l.* in money; on a bill filed by C to have satisfaction for his debt of the leasehold estate, being part of H's assets, the question was, Whether this was a good sale to bind a creditor? And it was held it was not, for D was a party consenting to and contriving a *devastavit*

Crane v. Drake, 2 Vern. 716. Note: Lord Hardwicke admitted the principle of this case, but doubted whether the facts warranted the application of it. Vide 2 Ves. 469; *sed vide* Powell, 570 a, note (P).]

{And a transfer of the assets by an executor, immediately after the death of the testator, to secure a previous debt of his own and also future advances to him, was set aside in favour of general legatees, because the creditors, though there was no direct fraud, had been guilty of gross negligence. The transfer was made within one month after the testator's death, so that there could be no presumption of a right to the assets acquired by payments made, in that short time, on account of the estate. The property was stock standing in the name of the testator. The creditors had full notice that it was not to be applied to any demand upon the estate, but wholly to the private purpose of the executor. And they relied upon the representation of the executor that he was entitled to the property by the will, and did not examine the will, by which they would have seen that he had no right to

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the stock till the claims under the will were satisfied, and that some of them remained unsatisfied.

7 Ves. J. 152, *Hill v. Simpson*. And see also 2 Dick. 724, *Scott v. Tyler*; 2 Bro. C. C. 431, *W. C.*; 4 Ves. J. 42, 43.]

No, where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, Whether such creditor should retain it by way of security for his own debt, as well for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that though a purchaser or a mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favour one creditor, which would be the consequence if this was allowed. Such creditor, as to his old debt, could not be put into a better condition by taking the mortgage, but must come in *pari passu*, with the rest of the creditors; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the court would not suffer the trustee to do, considering the giving preference to one creditor as a fraud, which the court would not allow.

*Idell v. Deane*, 1 Ves. 215; [1 Dick. 132, *S. C.*]

If a deed, by which a prior charge is made upon an estate be delivered, among other papers relating to the title thereof, to an intended purchaser, he will be taken to have notice of the prior encumbrance; it being necessarily presumed, that so material a circumstance could not escape his notice, or, if it did, it must be through gross neglect.

Thus, the plaintiff's father and mother sold an estate to C and his heirs, which, pursuant to an agreement made on their marriage, had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail-male; and the conveyance was made by deed and fine. C, upon his purchase, took in a mortgage-term, which was prior to the settlement, entered and afterwards sold the estate to H and I. It appearing, by the proofs in the cause, that C, the first purchaser, had notice of the settlement, and that the same, amongst other writings, were delivered to him, the court decreed, that C should account for the consideration-money for which he sold the estate, with interest from the decease of the plaintiff's father and mother, discounting what was due on the mortgage made prior to the settlement.

*Ferrers v. Cherry*, 9 Vern. 384. [In *Senhouse v. Earl*, Ambl. 289, Lord Hardwicke denied the authority of this case, but he seems to have acknowledged it in *Mertins v. Jolliffe*, Ambl. 311; and see *Hiern v. Mill*, 13 Ves. 191; *Powell*, 572 a, note (T).]

And if it do not appear upon the face of such settlement, whether it be voluntary, or on articles before marriage, and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case; for the purchaser, having notice of the deed, must, at his peril, purchase, and be bound by the effect of it. But, in the last case, the bill was dismissed as to H and I, who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove any notice against them, there was no foundation to presume knowledge of the settlement, C being able to make a good title without it.

A creditor by judgment, in 1698, for 600*l.*, came to an account with the conusor in the year 1707. and settled the remainder due upon the judgment

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at 420*l.*, and took a mortgage in fee for that sum, as a collateral security to the judgment; and one S, an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90*l.* of the consideration of the assignment was then the full worth of the estate.* S was likewise in possession of another mortgage made in 1688, upon the same estate which was subject to the judgment in 1698, and the mortgage in 1707. It was resolved S should not be allowed to tack the two mortgages together, so as to defeat intermediate encumbrances between the years 1688 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698, and by consolidating them together should entitle S to receive the sum due upon that judgment, prior to creditors after the year 1698; but, as to money reported due since the mortgage in 1707, it should be paid only in priority to creditors subsequent to 1707. One ground of which decision was, that the words in the recital of the assignment of the mortgage in 1716, viz.: "that 90*l.*, the consideration-money, was the full worth of the estate *at that time*," naturally implied, that there were intermediate encumbrances, and therefore, to give S the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the assignment of this puisne encumbrance, he must know the estate was worth no more from the very words of the recital.

*Morrett v. Paske*, 2 Atk. 54. Vide 1 Atk. 490, 491.

Again, I C, being seised of several freehold estates, had settled the same to certain uses, and being possessed of a prebendal lease for twenty-one years, which was usually renewed every seven years, and which he held at the time of making his will, after charging the same, together with other freehold estates, with an annuity, devised it to the same uses, intents, and purposes as were declared in the settlement of the freehold estates first mentioned. Then the testator died. The leasehold estate was several times renewed by the several persons in possession, and in one of the renewals, the then lessee was styled devisee of I C. Afterwards there were several other renewals. Then the estate was mortgaged by one of the claimants under the settlement and will, as his own property. And the question was, Whether the mortgagee, who had no other notice of any defect in his title, except that the lease which was assigned to him recited, among the considerations, the surrender of the former lease, which recited the surrender of the other, in which the lessee for the time being was styled devisee of I C, had such notice thereby, as would render the estates in his hands liable to the trusts of the settlement? And it was held, that the mortgagee was affected with notice of the settlement, and that he must convey the estate according to the uses, &c., limited and declared therein.

*Coppin v. Fernyhough*, 1 Bro. Ch. Rep. 291; [and see *Lord Redesdale's* judgment in *Hamilton v. Royce*, 2 Scho. and Lef. 327; *Harvey v. Ashley*, cited in 2 Scho. and Lef. 328; *M'Queen v. Farquhar*, 11 Ves. 467.]

||It is an established principle, that whatever is sufficient to put a party upon inquiry is notice in equity. As, if a person is aware that the legal estate is in a third person, he is bound to take notice what the trust is, and ought to make inquiry of the trustee. On the same principle it has been held, that a purchaser, being told an estate was in possession of a tenant, and taking it for granted it was a tenancy from year to year, was bound by the lease under which the tenant held; but it must be observed, that if the lease be invalid, the point of notice cannot prevent an ejectment at law. So, if the tenant claim an interest beyond a tenancy, as under an agreement to

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purchase, a purchaser or mortgagee will be held to have notice of that fact if he had notice of the tenancy. And the same doctrine has been applied to a tenant's right to timber, although accruing under a title posterior to that on which his right to the possession was grounded. But if a lease be made of charity lands, which is set aside as improvident, it seems a *bonâ fide* purchaser of a sub-lease will not be supposed to have notice of that fact, which depends on a number of extraneous circumstances. Notice that title-deeds are in possession of a third person may, under particular circumstances, be sufficient to set a purchaser upon inquiry to ascertain what lien the party holding has on the estate.

*Anon.*, 2 Freeman, 173, pl. 171; *Taylor v. Stibbert*, 2 Ves. jun. 440; 13 Ves. 190; 14 Ves. 426; 4 East, 221; *Daniels v. Davison*, 16 Ves. 249, 17 Ves. 43; *Allen v. Anthony*, 1 Mer. 262; *Attorney-General v. Backhouse*, 17 Ves. 283; *Hiern v. Mill*, 13 Ves. 114.]

Where there were father, mother, and son, and the father settled an estate on himself for life, then to his wife for her jointure, and on her death, to the sons of the marriage; under which settlement, the wife and son insisted on being purchasers for a valuable consideration, without notice, and notice of a prior charge was proved against the father, by recitals on his own conveyances, and in part by his own admission; but, as to the wife and son, there was no proof, but from these deeds being in the hands of the family; this was held not sufficient to affect them with notice; because such settlement might have been made by an apparent owner without the deeds having been looked into.

*Whitfield v. Fausset*, 1 Ves. 387; [*Collett v. Ward*, 7 Vin. Abr. 123.]

If a deed, or other paper which is deemed constructive notice of a prior encumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a person admits, or it be proved that a deed is in his custody, whether as representative of another or otherwise, it will be incumbent upon him to show when it came there, for it is impossible for the other side to show it.

2 Ves. 486.

Where tenant for life, remainder to his first son, mortgaged for 1500*l.*, and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding, being advised that the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money; yet the mortgagee having had no notice thereof, and having got the deed of settlement, the court would not relieve against him by compelling him to produce it.

*Brampton v. Barker*, 2 Vern. 159, 1 Eq. Ca. Abr. 333, 3. [This case seems to be overruled, see *Kelsal v. Bennett*, 1 Atk. 522; *Powell*, 581, note B, (6th ed.); *Sugden*, V. & P. p. 739, (6th ed.)]

Notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself.

*Merry v. Abney*, 1 Ch. Ca. 38; 1 Ves. 69; 2 Ves. 477; 3 Ch. Ca. 110; *Ashley v. Hallin*, 2 Ves. 368; *Hothwall v. Abney*, Nelson, Rep. 59; [*Coots v. Mammon*, 2 Bro. P. C. 506; 5 Ibid. 355; 2 Ball & B. 304; *Toulmin v. Steere*, 3 Mer. 210; *Sheldon v. Cox*, 2 Eden, 228; *Ambl. 626*, S. C.—The notice to the agent must be in the same transaction, and while the relation of principal and agent subsists. Fourth Res. in *Worralley v. Nearborough*, 3 Atk. 392; *Hiern v. Mill*, 13 Ves. 121; *Hamilton v. Royse*, 2 Mer. & Lef. 215; *Mountford v. Scott*, 3 Madd. 34; 1 Turner, 278, S. C.]

Thun, M. suffered a recovery of an estate in A, and then settled all his



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lands in A upon his family: afterwards a tenement in A, of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then M mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to B, who had advanced the money to pay off the former mortgage. It was sworn, that B's agent was present at the execution of the assignment when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to a person having the equity of redemption, but was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One question was, Whether the last mortgagee had not notice of the youngest son's title? And the court held, here was such evidence of general notice, either to the party himself, or to his agent, to take care, as made it necessary for him to inquire into the title, which not having done, he must take the consequence.

*Maddox v. Maddox*, 1 Ves. 61; 2 Ves. 485.

Again, E mortgaged his manor of B to M and his heirs, for securing 3000*l.*; afterwards G, the father of the plaintiff B, lent E 2800*l.*, and, by deed, reciting M's mortgage, he declared, that after the 3000*l.* interest paid, the estate should stand charged, and be a security for G's money. M *was no party to this deed*. Afterwards H, one of the defendants, lent E 400*l.*, and obtained a deed from E and M, that after M was paid, the estate should, in the next place, stand charged with the 400*l.*, and in like manner for C, and several other defendants. All the securities were transacted at the shop of W and Y, scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several lenders. The question was, Whether B should be paid next after M, or whether H and the others should be preferred, because they had got a declaration both from E and M, who, by that means, became a trustee for them, after his own money paid? And it was decreed, that B should be paid next to M, and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent.

*Brotherton v. Hatt*, 2 Vern. 574.

¶ And if the same solicitor is employed both for vendor and purchaser, it makes no difference as to the rule of notice, that the sale was made under the direction of the Court of Chancery, and that the purchasers were trustees on behalf of an infant. But the notice to the agent must be in the same transaction, even in the case of one solicitor being employed by both parties.

*Toulmin v. Steere*, 3 Mer. 210; *Mountford v. Scott*, 3 Madd. 34. Vide Sugd. V. & P. (6th ed.) 710, 735, as to notice generally.¶

And although a country attorney acts by an agent in causes in London,

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yet he will be considered as the solicitor for his clients, though he resides in the country, and what is known to him will be constructive notice to them.

3 Atk. 37.

A and B were empowered by act of parliament to purchase estates in a certain district to enable them to build a square; C (who was a barrister at law, and who appeared to have taken the management of the affair upon himself) purchased a parcel of ground held on a church lease, and borrowed 3600*l.* of D, and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: C afterwards built several houses, some of which were erected upon the ground on which D had his security, and then C granted a lease of these houses to H, reserving a ground rent; which was done for the purpose of establishing a rent; and H declared himself in writing to be only a trustee for C. Afterwards H assigned some of the houses in D's security to M, for securing a sum of money by him lent, and then he assigned all the houses to E likewise, for securing a further loan. Neither M nor E had actual personal notice of the mortgage to D, nor of each other's mortgage; but both M and E employed C as their counsel and agent in these transactions, and nobody else. On a bill filed by D for a sale of the estates, and to be paid his mortgage-money in the first place, one question was, Whether M and E were to be affected by the notice to C, their agent, of D's security? *Et per curiam*, It is a fixed and settled point, that notice to the agent is notice to the principal. C's acting in different capacities makes no difference. It is the same as if they had been in different persons.

*Meldrum v. Cox et al.*, Amb. Rep. 624; [3 Eden, 324, S. C.]; and see *Doe on dem. of Willis v. Martin*, Mich. term, 31 G. 3, [4 Term R. 39, 66.]

If one purchases in the name of another person, without any authority from him so to do, or his having notice of his intention, yet, if he afterwards agrees to it, he makes the former his agent *ab initio*.

Thus, G, in 1699, lent W 200*l.* upon a surrender of copyhold lands, but neglected to get the surrender presented at the next court-day as he ought to have done, for want of which the surrender was void, according to the custom of the manor. In 1703, B agreed with W to purchase the mortgaged premises for 400*l.*, and took a surrender in the name of M, who afterwards consented to become the purchaser, and paid the money. It was proved that B, whilst he was treating with W, had notice of the former encumbrance, and therefore declined to purchase in his own name, and took the surrender in the name of M, and procured him to become a purchaser, that it might be paid a debt, which W owed him, out of the consideration-money. On a bill filed by the executor of G, M pleaded himself to be a purchaser without notice of the plaintiff's demand; and that his surrender was presented, and he admitted tenant, without notice of G's surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration-money. But it was adjudged at the Rolls, that notice to B was sufficient to affect M; for, though he did not employ B to purchase for him, or knew any thing of it until after B had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made B his agent *ab initio*; and M was decreed to pay the 400*l.* and interest, or to surrender to the executor of G.

*Jennings v. Moore et al.*, 2 Vern. 688, S. C.; 1 Brown's Parl. Ca. 244; [1 Eq. Ca. Abr. 330; 2 Freem. 131; Nels. 32:] and see *Merry v. Abney*, 1 Ch. Ca. 33.

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But, examining a title in *one* transaction, in the ordinary course of business, which cannot be supposed to make any impression as to any future event, will not operate as constructive notice to an agent in general, or counsel or attorney, to affect his client on a *subsequent* transaction, and in another business at a distant period; for an agent or counsel cannot be supposed to remember every particular circumstance contained in deeds or papers that come under his perusal.

Case of Lord Falconbridge, cited 2 Ves. 369, Fitzg. 211; ||3 Atk. 294,|| S. C.; Worsley v. Earl of Scarborough, 3 Atk. 392. ||*Sed vide* Aldridge v. Duke, Finch, 439.||

And Lord Hardwicke, in the case of Warwick and Warwick, expressed his approbation of the rule laid down in the case of Fitzgerald and Falconbridge above mentioned, *that notice should be in the same transaction*; and his lordship said, that it should be adhered to, otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions. And in the principal case, it was held that notice, arising from a case (stated by one who was an agent for both parties in a subsequent mortgage) stated in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favourable to the purchaser.

Warwick v. Warwick, 3 Atk. 294; ||and see 1 Vernon, 57, 122, 286; Duke's Char. Us. p. 64, 638.||

So, where lands were settled by F on his marriage in 1734, which he mortgaged among others, in 1736, to W, who had no notice of the settlement, and R was employed as agent in making both the settlement and the mortgage; one question was, Whether W should be considered as having notice of the settlement, R having acted as agent on both occasions? And the court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far as to affect the principal, unless where the agent had it at the time of his transaction with him; and that, as the notice which the attorney had of the settlement in this case was two years before the mortgage, the mortgagee could not be affected by it.

Steed v. Whitaker, Barnard. 220.

It hath not been settled, whether, where one employs an attorney or counsel, and, for want of despatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior encumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself.

Vane v. Barnard, Gilb. Eq. Rep. 7, 8.

||But in the case of Bury v. Bury, Lord Hardwicke said, "where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice."

Bury v. Bury, Sugd. V. & P. (6th ed.) 713, and append.||

If one take a mortgage by assignment from a mortgagee, affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better right than he has himself. And if such original mortgagee, in a bill filed by the person setting up an eigne

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title against the mortgagee and his assignee, and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him.

Whalley v. Whalley, 1 Vern. 484; ¶ and vide 15 Ves. 335, Coote on Mortg. 376.¶

T having made mortgages of some parts of his estate, these mortgages afterwards by mesne assignment became vested in W, and carried with them the legal estate. T then became a bankrupt, but, before the assignment of T's effects to the assignees, W obtained a lease of the equity of redemption from T, for a valuable consideration; on a suit brought by the assignees against W to set aside these conveyances, it was held, that a purchaser for a valuable consideration, without notice of the bankruptcy, could not be relieved against within 21 Jac. 1, ¶c. 19, § 14.¶(a)

Collett v. De Golls, Ca. temp. Talbot, 65. ¶The doctrine of this case, though overruled by Lord Erskine, in *Ex parte Herbert*, 13 Ves. 183, and doubted by Lord Redesdale in *Latouche v. Dunsany*, 1 Scho. & Lef. 152, and apparently questioned by Lord Eldon in *Ex parte Knott*, 11 Ves. 619, (the report of which, however, is ambiguous and inaccurate,) seems to be good law. See *Hitchcock v. Sedgwick*, in Dom. Proc. 2 Vern. 156; Sugden, V. & P. 729, (6th ed.); Coote, 430; Powell, 592, note. (a) See the 86th section of the new bankrupt act, 6 G. 4, c. 16.¶

H B, on May 1st, 1710, was arrested at the suit of one S, for a just debt of 790*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above six months, which, although he afterwards paid the debt and many thousand pounds to others, and appeared publicly on the exchange, was adjudged an act of bankruptcy by the statute of Jac. 1. Afterwards, in 1717, H B, on the marriage of the defendant, his son, made a settlement, by which, after reciting that he had on his own marriage settled land on trustees, in trust, to secure 2000*l.* to his wife if she survived; H B, *with the privity of the trustees, who were parties to it*, assigned all his estate, right, title and interest to the wife's relation for the benefit of H B, for life, and of his wife for life, &c. The plaintiff W was the assignee under a statute of bankruptcy, taken out against B subsequent to the settlement. The question was, Whether a court of equity would decree the trustees of the first settlement to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement? For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law; and that, although they had not the legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, being parties to the last settlement, were become their trustees. And it was so held by the chancellor, who said, he took it to be the rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had a prior legal estate, but where he had a better title, or right, to call for the legal estate than another; and therefore dismissed the bill.

Wilkes v. Bodington, 2 Vern. 599; [and see S. C. *com. sem. nomine*, Read v. Ward, 2 Vin. Abn. 119. Vide this doctrine confirmed by Lord Eldon, in *Ex parte Knott*, 11 Ves. 618.¶

A lent money on lands, the mortgage being duly registered, and afterwards H lent money on mortgage on the same security, and his mortgage was also registered, and then A advanced a farther sum on the same lands without notice of the second mortgage; it was held by Lord Chancellor King, that

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the registering of the second mortgage was not *constructive* notice to the first mortgagee before his advancement of the latter sums: for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered than they had before.

*Bedford v. Backhouse*, 1 Eq. Ca. Abr. 615, 12. {In New York, registered mortgages must be paid according to the date of their registry, and the doctrine of tacking does not apply to them. 1 Cain. Er. 112, *Grant v. Bank of the United States*. And see 1 Bin. 131, 132.—An unregistered mortgage is good between the parties; the object of the registry acts being only to protect subsequent purchasers. 9 Ves. J., 407, *Jones v. Gibbons*; 1 Dall. 434, *Levinz v. Will*; 2 Johns. Rep. 601, *Clute v. Robinson*.}

So, in a later case, where W advanced 800*l.* on a mortgage in Yorkshire, and registered it; afterwards K lent a sum of money and took a judgment for it, which was also registered; then W advanced a farther sum, but without any express notice of the judgment; and it was argued, on a bill brought by W to foreclose, that K ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every encumbrancer should be satisfied according to the priority of his register; and that the registering K's judgment was constructive notice to W, sufficient to deprive him of the common benefit of a court of equity, whereby a first mortgage, without notice, was to hold till all subsequent encumbrances due to him were discharged: it was resolved, that these statutes avoided only prior charges not registered, but did not give *subsequent* conveyances registered any farther force, against *prior* conveyances registered, than they had before; and that to have affected W, K ought to have given him notice when he advanced his money; for, though W might have searched the register, yet he was not bound so to do.

*Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609, 7.

||So, also, where a subsequent mortgagee obtained the legal estate, Lord Camden decided, that he should have priority over a prior equitable encumbrance of which he had no notice, notwithstanding such equitable encumbrance was duly registered. The doctrine that mere registration is not equivalent to notice, has also been laid down by Lord Redesdale in several cases in Ireland. In *Bushell v. Bushell*, where the question was, Whether the registration of certain marriage-articles amounted to notice, his lordship pointed out the difference between the Irish act and the English registry acts, the former of which declares, that every registered deed shall be good and effectual, in law and equity, "*according to the priority of time of registering the memorial*;" but his lordship thought that the registry was not *notice* more under the one act than the others; and in a subsequent case, in which he decided that the Irish registry act would not permit tacking, his lordship pointed out the inconveniences arising from holding registry to be notice, and said, "if it be notice, it must be notice whether the deed be duly registered or not; it may be unduly registered, and if it be, the act does not give a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites." In reply to this forcible observation, it has been contended, in a very learned work, that the courts might hold that the registry of a deed should not amount to notice unless it was *duly registered*. But it is humbly conceived that Lord Redesdale's argument is unanswerable; and that as the effect sought to be given to the registry does not rest on any intrinsic efficacy in the registering, but merely on the ground of the registry being constructive notice, it would be contrary to principle to hold that it should not have that effect merely on account of

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a technical informality, in no way rendering it less an actual notice of the encumbrance.

Morecock v. Dickens, Ambl. 678; Bushell v. Bushell, 1 Scho. & Lef. 103; La-  
touch v. Dunsany, 1 Scho. & Lef. 157; and vide Underwood v. Courtown, 2 Scho. &  
Lef. 64; Pentland v. Stokes, 2 Ball & B. 68; Sugd. V. & P. (6th ed.) 677; Coote on  
Mort. 385.]

A subsequent mortgagee, having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered in equity, as fraudulent, and the party hath that notice which the act of parliament intended he should have.

Cowper's Rep. 712. {Vide 4 Dall. 153, Stroud v. Lockhart.}

Thus, N, in 1718, married his first wife, and on the marriage a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, to be settled on trustees, in trust for N for life, then for his intended wife for life, remainder to the issue of the body of N by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743, N married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the statute 7 Ann. c. 20, which requires registry. The first marriage articles and settlement were never registered; the second were. N also mortgaged this estate, as absolute owner thereof. The bill was brought by the children of the first marriage, to have the benefit of the settlement made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered. The ground of this application was, that the agent who made the last settlement had notice of the first. And notice to the agent having been fully made out, the principal question was, Whether it would affect the defendant's purchase, and oblige the court to postpone the second articles and settlement to the first, notwithstanding the registering act? And the court determined it would; for the intent of the act was to secure subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance.

Le Neve v. Le Neve, 1 Ves. 64; 3 At. 646, S. C.; and vide Cheval v. Nichols, Nt. 404; and Sheldon v. Cox, Ambl. R. 624; [2 Eden R. 224; Bushell v. Bushell, 1 Scho. & Lef. 103; Biddulph v. St. John, 2 Sch. & Lef. 521.]

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of Lord Forbes v. Deniston, which arose in Ireland.

Recited in last case, 1 Ves. 67; 2 Brown's Parl. Ca. 425. [See 1 Scho. & Lef. 100. Powell, 400, note.]

But though apparent fraud or *clear* and *undoubted* notice are held to be a proper ground of relief in cases circumstanced like the preceding ones, *suspicion* of notice, though a *strong suspicion*, was held by Lord Hardwicke not to be sufficient to justify the Court of Chancery in breaking in upon this

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*act of parliament.* And therefore, where a mortgagee of lands in Middlesex, swore in his answer, that, to *his belief*, he did not know of a judgment which had not been registered, until after his mortgage executed; this was contradicted by *one witness only*, who swore, that, on a conversation at which she was present, the mortgagee admitted that it was true “he knew of the judgment, but that he knew, at the same time, that it was not registered; and what were acts of parliament for, unless they were effectually observed?” Lord Hardwicke said, that, undoubtedly, this was *material evidence*, but then it was only *one witness* against the answer of the defendant, and the evidence amounted merely to a defendant’s *confession* in contradiction to his *answer*, and was contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His lordship, therefore, dismissed the plaintiff’s bill as to this part of the case.

*Hine v. Dodd*, 2 Atk. 275; {3 Ves. J. 486;} ||S. C. *Barnard*. 258, recognised by Lord Manners, 2 Ball & B. 301; and see *Jollond v. Stainbridge*, 3 Ves. 478; *M’Queen v. Farquhar*, 11 Ves. 467.]]

It is an infallible rule, that a mortgagee may, in a court of equity, protect himself from discovery of his title-deeds if he denies notice. For, if a plaintiff brings his bill to redeem ever so strongly, he is not entitled to see the mortgagee’s title-deeds, because a third person may find out a flaw in them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money; this is a first principle, and not to be argued, and depends on the denial of notice.

*Stenhouse v. Earle*, 2 Ves. 450; *Perrat v. Ballard*, 2 Ch. Ca. 73. Ibid. 135, 136, 1 Vern. 27; *Hall v. Atkinson*, 1 Eq. Ca. Abr. 333.

If A purchases an estate, with notice of an encumbrance, or that it is redeemable, and then sells to B, who has no notice, who afterwards sells to C, who has no notice; by this the notice to A, the first purchaser, will not be revived; for, if it were so, an innocent purchaser, without notice, might be forced to keep his estate; he could not sell, and would be accountable for all the profits received *ab initio*. But the interest must be the same in *every respect*, or the principle does not apply.

*Harrison v. Forth*, Prec. Chan. 51; and vide also *Lowther v. Carlton*, Ca. temp. Talb. 157; and vide *Brandlyn v. Ord*, 1 Atk. 571; ||*M’Queen v. Farquhar*, 11 Ves. 478; *Kennedy v. Daly*, 1 Scho. & Lef. 379; *Redesd. Tr. Pl.* 224, (3d edit.)]]

Upon this ground, where A, who was entitled to the equity of redemption in certain lands, had brought his bill against the representatives of B, who was the mesne purchaser, and likewise against C, who was the puisne purchaser; A had not replied to the answer of the representatives of B, and the question was, Whether they should not have been brought before the court as proper parties? *Per* Lord Hardwicke Chancellor,—The representatives of B deny he (B) had any notice of A’s title at the time he purchased; and it is admitted on all hands that C, who purchased of B, had notice of the title; now, if I should go on with this cause, I should deprive C of the benefit he would have from the defence which is set up by the representative of B. It is like the cases at law by warranty, &c., where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this reason, his lordship allowed the objection, for want of parties in not bringing the representatives of B before the court.

*Lowther v. Carlton*, 2 Atk. 139; ||Ca. temp. Talb. 187; *Barn. C. C.* 358; *Forr.* 187, S. C.]]

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Again, where a bill was brought to discover whether the defendant, who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was assignee of the mortgage for valuable consideration, and through many assignments from persons who had no notice; it was argued that this plea was not good; for it should have stated, whether the defendant personally had notice; but the Master of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to show whether he had or had not notice; for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

*Sweet v. Southcote*, 2 Bro. R. Chan. 66; [2 Dick. 671, S. C.; and vide 11 Ves. 478.]

A mortgage made by K in 1659, by divers mesne assignments vested in N; it was objected, that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though N paid a valuable consideration, yet this would not purge the fraud, and make it good against one who was purchaser *bond fide*, and for a valuable consideration. *Sed non allocatur*; for Holt, C. J., said, that the first mortgage was good between the parties, and being so, when the first mortgagee assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and therefore was within the proviso of the statute 27 Eliz. c. 4, "that no mortgage *bond fide* and upon good consideration, should be impeached by force of this act, but it should stand in such force as before the act made;" and if this proviso did not extend to the case, to what case should it extend?

Andrew Newport's case, Rep. T. Holt, 477; Skin. 423, S. C.; [nom. Smartle v. Williams, 1 Salk. 245; 3 Lev. 387; Holt, 478; Comb. 247;] and vide *Shirk v. Clark et al.*, Prec. Chan. 275.

¶ The registry of a mortgage is equivalent to a notice, and subsequent mortgagees and purchasers must look to it at their peril.

*Frost v. Beekman*, 1 Johns. Ch. 298; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Johnson v. Stagg*, 2 Johns. 510; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 610; *Brinckhoff v. Lansing*, 4 Johns. Ch. 70; *Thayer v. Davidson*, 1 Bail. Eq. 412.

But the registry of a mortgage is notice only to the extent of the sum specified in the register.

*Frost v. Beekman*, 1 Johns. 299; S. C. 18 Johns. 544.

The unauthorized registry of a mortgage would not, it seems, be notice to a subsequent purchaser.

*Beekman v. Frost*, 1 Johns. 300.

The registry of an assignment of a mortgage is not notice to a mortgagor, so as to make payments by him to the mortgagee payments in his own wrong. But it is effectual notice to a subsequent mortgagee or purchaser.

*James v. Johnson*, 6 Johns. Ch. 417. See *Vanderkemp v. Shelton*, 1 Clarke, 321.

An attorney who held a mortgage upon certain premises was employed by the mortgagor to draw the deed and to assist him in conveying a part of the mortgaged premises to another person who was ignorant of the existence of the mortgage, and such attorney knowing that the purchaser was paying the full value of the premises, concealed from him the fact of the previous en-



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cumbrance. Held, that in equity the attorney could not enforce the lien of his mortgage against that part of the premises conveyed to the purchaser.

*L'Amoureux v. Vendenburgh*, 7 Paige, 316.

In Kentucky, the registry of a second mortgage, which passes only the equity of redemption, does not operate as a notice.

*Averill v. Guthrie*, 8 Dana, 82. See *Nelson's heirs v. Boyce*, 7 J. J. Marsh. 404; *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 558; *Bank of Kentucky v. Vance*, 4 Litt. 169.

**EQUITIES AND PRIORITIES AMONG MORTGAGEES.**—Registered mortgages must be paid off according to their priority.

*Grant v. United States Bank*, 1 Caines' Cas. Er. 112.

The lien of a second mortgagee is merely equitable, the legal estate being in the first mortgagee.

*Bank of Kentucky v. Vance*, 4 Litt. 169.

When a mortgagee, knowing that another person is about to lend money on the mortgaged premises, denies that he has a mortgage, or says that it is satisfied, he will be postponed to the second mortgagee, who has been induced to lend his money by the concealment or misrepresentation.

*Lee v. Munroe*, 7 Cranch, 366.

A second mortgagee took a conveyance of the equity of redemption, in consideration of the debt due to himself and other mortgagees, which he thereby took upon himself and covenanted to pay. Held, that his debt was extinguished.

*Brown v. Stead*, 5 Sim. 535.

But where a purchaser of the equity of redemption in mortgaged premises which are subject to the encumbrance of two mortgages of different dates, takes an assignment of the prior mortgage for the protection of his title, such mortgage will not be merged in the equity of redemption, so as to give the junior mortgagee a preference in payment out of the proceeds of the sale of the mortgaged premises.

*Millsbaugh v. M'Bride*, 7 Paige, 509.

When two mortgages are given simultaneously on the same property to two different persons, and without any intention of giving a preference to either, and each mortgagee is aware of giving the other mortgage at the time he receives his own, neither of them is entitled to a preference in payment, under the New York recording act, although one of them procures his mortgage to be recorded first.

*Rhoades v. Canfield*, 8 Paige, 545. See *Douglass v. Peale*, 1 Clarke, 563.

A mortgage was executed to secure the payment of promissory notes, but the notes were misdescribed in the mortgage. Held, that the mortgagee was entitled to relief in equity against a subsequent mortgagee.

*Porter v. Smith*, 13 Verm. 492.

A second mortgagee, after the satisfaction of the first mortgage, has a right to claim from the first mortgagee, after notice, the rents and profits which have not been accounted for to the mortgagor, so far as the same are requisite to the satisfaction of his mortgage.

*Gordon v. Lewis*, 2 Sumn. 143. See 7 Dana, 70.

Where a mortgagee understandingly and intentionally cancels his mortgage, and in lieu thereof takes a deed of the same premises, and, prior to the deed, the mortgagor executes a second mortgage upon the premises, in

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the instance of fraud on the part of the mortgagee, the first mortgage will not be revived, nor the second mortgagee prevented from reaping the benefit of his priority acquired by the cancellation of the first mortgage.

*Primmer & Inslee, 1 Green's Ch. 239.*

*2. If he Equity remain must be done by him who would redeem to the Person against whom a Redemption is prayed. And herein of the Doctrine of Tacking.]*

It is a rule in equity, that he that will have equity to help where the law cannot, shall do equity to the party against whom he seeks to be relieved; and that therefore, where there is an estate subsisting in law, as there is in the mortgagee after foreclosure, equity will not destroy it, unless the party redeeming will satisfy all equitable demands out of the estate.

Therefore the debtor, before he can redeem in equity, must pay not only the principal and interest of the debt, but all costs necessarily incurred by the creditor in maintaining the title to the estate; in renewing leases; making necessary repairs, or permanent improvements, but not in opening mines and quarries. And he must will award interest on the sums from the time of their being advanced.

*Griffith v. Wilson, 3 Atk. 515; Lucas v. Mertins, 1 Wils. 34; Manlove v. Ball, 2 Vern. 41; Hamilton v. Denny, 1 Ball & B. 203; Hardy v. Reeves, 4 Ves. jun. 480; Hughes v. Williams, 12 Ves. 422.*

And where the mortgagee had carried the mortgage into settlement, whereby it became necessary to make the trustees and *cestui que trusts* parties defendants, the mortgagor was obliged to pay the costs of all.

*Wentwell v. Collins, 3 Madd. 253.*

So, the mortgagee will be allowed the costs of taking out administration to the mortgagor, as principal creditor, or to an encumbrancer under the will of the mortgagor, as a necessary party to foreclosure.

*Ramsden v. Langley, 2 Vern. 336; Hunt v. Fownes, 9 Ves. 70.*

If, however, the costs incurred are altogether irrelevant to the mortgage, they will not be allowed to the mortgagee; thus, in a case in which a devisee of a mortgagee filed his bill against the heir and executor of the mortgagor for a foreclosure, and also against the heir at law of the mortgagee for establishing the will, the Master of the Rolls ordered that the plaintiff should pay the heir of the mortgagee his costs, and should not be allowed them out of the estate.

*Step v. Wyatt, 1 Cox. R. 353; and see Wilson v. Metcalf, 3 Madd. 45.*

If a mortgagee be guilty of gross misconduct, he will be refused costs; and even, under certain circumstances, be compelled to pay them.

*Moxon v. Morganrovd, 1 Will. R. 393; Deullin v. Gale, 7 Ves. 583. Vide Trimleova v. Hauch, 1 Ball & B. 383; Loftus v. Swift, 2 Scho. & Lef. 642.]*

On this foundation it hath been frequently adjudged, that if a mortgagor borrows more money of the mortgagee upon bond, where the heir is bound, and dies, the heir of the mortgagor shall not redeem without paying the bond-debt, as well as that secured by the mortgage; because when the condition is broken, so that the term or interest becomes absolute in the mortgagee, if the heir of the mortgagor will have equity, he must do equity by the payment of the whole money due to the mortgagee; and this is called a *rebutter*. But if the bill was exhibited by the mortgagee to foreclose, there, if the heir of the mortgagor tender principal and costs, it sufficeth, without tender of the money due on the bond, because such bond was not

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originally any lien on the land itself; and if that be tendered for which the land was originally pledged, there is no reason to debar the heir of his right of redemption.

2 Chan. Ca. 164; 2 Chan. R. 247; Vern. 245; 2 Chan. Ca. 194. *β* A mortgagor owing a collateral debt to the mortgagee is not entitled to redeem, without paying such collateral debt, as well as the money charged on the land. *Scripture v. Johnson*, 3 Conn. 211. See *Mallory v. Aspinwall*, 2 Day, 280.*g*

So, where a husband and wife levy a fine of the wife's land, to enable them to take up the sum of 400*l.*, and they make a mortgage for it, and after the mortgage is forfeited, the husband pays in part of the mortgage-money, but afterwards borrows again the sum of the mortgagee; it was decreed, that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife until the whole money was paid; and if the heir would not pay in the whole principal, interest, and costs, he should be foreclosed.

Vern. 41, *Reason v. Sacheverel*. *¶* See S. C. 2 Ch. Ca. 98. It appears, Reg. Lib. 1681, B. fol. 409, that an endorsement was subscribed by baron and *feme* on the mortgage-deed, that the land should stand charged with the money, and the wife, with consent of husband, devised the land for payment of debts, the plaintiff's debt in particular. See *Raitby's Vern. v. 1*, p. 41, note (1).*¶*

So, if a lessee for years mortgages his term, and afterwards borrows money of the mortgagee on bond, and dies, his executor shall not redeem without paying the bond as well as the mortgage.

2 Vern. 177; *Preced. Chan. 18*, S. C.

So, where a man borrowed 200*l.* on the pawn of some jewels, which were worth about 600*l.*, and took a note from the pawnee, acknowledging the jewels to be in his hands for securing the 200*l.*, and afterwards the pawner borrowed at several times three several other sums of money of the pawnee, and gave his note for each sum, without taking any manner of notice of the jewels, and died; and his executors having brought their bill to redeem the jewels, on payment of the 200*l.* first lent thereon, and interest; it was held, that to entitle them to such redemption, they must pay all the money due on the several notes, on this foundation, that he who will have equity must do equity; and that therefore, since the plaintiffs could not have back these jewels without the assistance of this court, it is reasonable and just they should pay the defendant all moneys due to him, it being natural to suppose the pawnee would not have lent those sums, but on the credit of the pledge he had in his hands before.

*Prec. Chan. 419*; 2 Vern. 691, *Demainbray v. Metcalf*; *¶* *Gilb. Rep. Eq. 104*; *Eq. Abr. 324*, S. C.; and see *Green v. Farmer*, *Burr. 2214*; S. C. 1 Bl. R. 651; *Jones v. Smith*, 2 Ves. jun. 372.*¶*

*¶* But still it seems that a mortgagee cannot tack a mere simple contract debt against a mortgagor. *Hopkins* demised land to *Ford* for a term of years, for securing 400*l.* and interest; *Ford* lent a further sum, and then died, and *Hopkins* became bankrupt. The executors of *Ford* prayed a sale and an application of the produce to the discharge of both sums. Lord *Eldon* said, he was confident there never was a case where a man, having taken a mortgage by a legal conveyance, was afterwards permitted to hold that estate as further charged, not by a legal contract, but by inference from the possession of the deed; and the order was consequently confined to the mortgage debt.

*Ex parte Hooper. 19 Ves. 477*; 1 Mer. 7, S. C.*¶*

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If A is bound in several bonds with B as his surety for 4000*l.*, and B conveys the manor of C to A by way of mortgage, to counter-secure him against the bonds for 4000*l.*, and A dies, and after D, the son and heir of A, becomes bound with B for 2000*l.* more; but there is no agreement that the mortgage should be a security to D against the bond for 2000*l.*, and after B dies, his heir shall not be permitted to redeem upon payment of the 4000*l.* only, but must save D harmless, as well touching the 2000*l.* as the 4000*l.*; for he that will have equity to help where the law cannot, must do equity to the party against whom he seeks to be relieved.

Chan. Ca. 97, *St. John v. Halford*.

[Where a woman, being a bond creditor, married a mortgagee, and died, and the husband took out administration to his wife, he was allowed, on a bill brought by him to foreclose, to tack the bond to the mortgage, against the heir at law.

*Blackwell v. Symes*, cited *Ambl. Rep.* 686.

So, where F, seised in fee, mortgaged to P for years, and P died, having devised his real and personal estate to his daughter S, and made her executrix; and S afterwards lent F 500*l.* upon bond; the question was, Whether S could tack the bond-debt to the mortgage? which depended upon the question, Whether S was to be considered as entitled to the bond and mortgage in different rights, the one in her own right, and the other as executrix? And it was held by Sir Thomas Sewel, Master of the Rolls, upon the authority of the last-mentioned case, that S might tack these debts.

*Price et al. v. Fastnedge*, *Ambl. Rep.* 685.

But if one be indebted to A by mortgage of a term for years, and also indebted to him by bond; if, on the death of the mortgagor, the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, *he* shall only pay the mortgage-money.

1 P. Wms. 777.

Upon the same principle, where, on a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest, the defendant insisted to have a judgment, which had been assigned to him, first satisfied before he should redeem, Lord Harcourt, chancellor, said, *copyhold lands are not liable to an execution upon a judgment; ergo*, the judgment shall not be tacked to the mortgage in this case, but the mortgagor shall redeem upon payment of the principal, &c., without satisfying the judgment.

*Cannon and Pack*, 2 Eq. Ca. Abr. 226, 6; 6 Vin. Abr. 222, 6.

||But it is decided that a mortgagee may tack a judgment debt, although the mortgagor have become bankrupt, and no execution has been issued on the judgment at the time of the bankruptcy; notwithstanding the statute of 21 Jac. 1, c. 19, § 9, which declares that creditors having security by judgment, whereof there is no execution issued on the lands or goods of the bankrupt before his bankruptcy, shall not be relieved upon such judgment for more than a rateable part of the debt with the other creditors. The Master of the Rolls said, that the subsequent bankruptcy could not affect the mortgagee, who before the bankruptcy had a complete lien on the land, as well for the judgment as the mortgage debt. The statute related only to judgments that continue merely such at the time of the bankruptcy; not to

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those which had acquired all the effect of an actual mortgage, as was the case of a judgment obtained by a party having an antecedent mortgage.

*Baker v. Harris*, 16 Ves. 397. See 2 Christ. B. L. 112, (2d ed.); *Powell*, 526, note, (6th ed.)||

Where A mortgaged lands to B for 60*l.*, and was also indebted to C 50*l.* on bond, and B assigned his mortgage to C, the court determined that, as the estate vested was a *chattel lease* liable to debts, and C had an assignment of it, and the bond-debt was just, A, the plaintiff, ought not to be let into redemption of the mortgage, but upon payment of both debts; and it was decreed accordingly.

*Halliley v. Kirtland*, 2 Ch. Rep. 361; ||*Baxter v. Manning*, 1 Vern. 244.||

If the money due on the bond be lent first, and the mortgage made afterwards, yet there is the same equity for the mortgagee to have both sums paid him. Thus, where A borrowed of B 300*l.* on bond, and afterwards mortgaged lands to B for 2000*l.* lent, and then died, the plaintiff, the heir of A, prayed a redemption; and the defendant insisted that the 300*l.* was agreed to be secured also by the mortgage; the plaintiff was decreed to pay the defendant both debts.

*Wyndham v. Jennings*, 2 Rep. Ch. 247. ||See *Powell*, 347, note G, (6th edit.)||

But, if the mortgagee or assignee, to whom money is due on bond, countenance a fraud upon a third person, by concealment thereof, he shall be redeemed upon payment of the principal money only: therefore, where the plaintiff, devisee of an estate, subject to a mortgage term for 1000 years, let the interest run in arrear, and gave several bonds for securing it, and then died; his son and heir being about to marry, the intended wife's father applied to the mortgagee to inquire what was due on the mortgage, who, being desired not to discover the bonds, said, that there was only 500*l.* due, and that all interest was paid; and that, upon payment of the 500*l.*, he would deliver up the mortgage; the court held, on application to redeem, that the mortgagee, by concealing the bonds, had discharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500*l.* with interest from that time, and without costs.

*Barrett v. Wells*, Prec. Ch. 131.

In respect of the heir, if there be several *encumbrances* upon an estate, and the prior encumbrancer claims a bond likewise, it will be postponed to all real encumbrances, whether by mortgage, judgment, or statute; for the bond is no charge on the estate, and he hath not the same equity against a puisne encumbrancer, as against an heir at law, who is liable to the bond in respect of assets.

*Morret v. Haske*, 2 Atk. 52; *Gory's case*, 3 Salk. 240; *Troughton v. Troughton*, 1 Ves. 87; *Powis v. Corbett*, 3 Atk. 556, 3 Salk. 84, 7. ||And it seems notice of the bond to the purchaser, &c., will not vary the case. *Powell*, 350 a, note R.||

Upon the same principle, if the person, claiming the equity of redemption, is a purchaser for a valuable consideration, the mortgage may be redeemed by him without discharging the bond; because the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not.

*Bayley v. Robson*, Prec. Ch. 89; *Archer v. Snatt*, 2 Str. 1107; *Wood v. Mortimer*, cited in the last case, 1 Eq. Ca. Abr. 325, 10; 1 Ves. 87; *Coleman v. Wynce*, Prec. Ch. 511. Vide *Troughton v. Troughton*, 1 Ves. 87; ||*Adams v. Claxton*, 6 Ves. 229.||

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Nor shall a bond be discharged on redemption of a prior mortgage, against creditors under a deed of trust of the equity of redemption; for it is only a charge upon the assets.

Anon., 2 Ves. 662; {6 Ves. J., 226, Adams v. Claxton, S. P.}

Therefore, where the question was, Whether a mortgagee, who had lent a farther sum afterwards upon a bond, should be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor, under a trust for payment of debts created by the will of the mortgagor, it was decided that the mortgagee should not tack the bond to the mortgage; for there being a devise for the payment of debts, the descent was consequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, must come in *pro rata*, with the rest of the creditors under the trust.

Heams v. Bance, 3 Atk. 630; [Adams v. Claxton, 6 Ves. 229.]

And a mortgagee cannot take a bond to his mortgage, even against other specialty creditors. This point was so determined on reference to the principle upon which the rule, in respect of tacking a bond debt to a mortgage, is founded, and which furnishes an obvious solution of all the cases which we have stated as exceptions to the rule. For the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuitry of suits; it is solely matter of arrangement for that purpose; for the right has no foundation in natural justice. A creditor's having another specific security, cannot give him in justice any priority. It is not done in any case but that of the heir, and merely to prevent circuitry.

Lowthian v. Hasel, 3 Brow. Rep. Chan. 162.

A purchased of B the lands in question, and re-mortgaged them for securing part of the purchase-money, and for other part thereof, gave a note payable on demand, on which 200*l.* remained unsatisfied, and A devised his lands to be sold for payment of his debts, and died, not leaving sufficient assets: the question was, Whether this 200*l.* remaining due on the note, being for part of the consideration-money, should have a preference to other debts, and be looked on in equity as a charge upon the land? And it was insisted upon, that it should, because B, as mortgagee, had the real estate in him. But it was held, that B could have no preference, but must accept satisfaction in proportion only with the other creditors.

Bond v. Kent, 2 Vern. 281.] [As to the vendor's equitable lien for the purchase-money, see Powell, 354 a, note P, (6th ed.,) and cases there cited.]

If A acknowledge a statute to B for payment of 800*l.* with interest, which being forfeited, and the lands extended upon it, A, for a valuable consideration, settle the same lands in tail, and after borrow money of B, and by articles it be agreed, the statute and extent shall stand a security for the last money, and after A die, and the 800*l.* with interest be satisfied by reception of the profits; yet the issue in tail shall not be relieved against the penalty of the statute; for though the heir has an equity, by reason of the tail made upon a consideration, yet the money lent raises an equity for B, so that B hath both law and equity, whereas the issue in tail hath equity only till the penalty is satisfied.

Hard. 318, Sir John Hedworth and Primate.

The plaintiff, as assignee of a statute of bankruptcy, brought his bill to redeem a mortgage of the manor of Newington in Kent, made by the bankrupt to the defendant: the defendant by answer insisted, that he first lent

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the bankrupt 200*l.* on a mortgage of a particular tenement, and afterwards lent him 300*l.* on a mortgage of the manor of Newington, which was of greater value than the money due, but the first mortgage was deficient in point of value: it was held, that if the plaintiff would redeem one he must redeem both.

2 Vern. 286, *Pape v. Onslow*.. [In *Ex parte King*, 1 Atk. 300, Lord Hardwicke said, he was not satisfied that this was the established rule of the court; that this case was very imperfect, and that he would not have it cited for the future, till it had been compared with the entry in the registrar's office. He said further, he was very apt to believe that the tenements were parcel, and holden of the manor of Dale; and that was the reason Lord Cowper so determined.—Search has since been made for it in the register's book, but no minute of it has been found there.—But the rule, as here stated, is recognised in other cases; viz., *Purefoy v. Purefoy*, 1 Vern. 29; *Shuttleworth v. Lawick*, *Ibid.* 245;] [and was subsequently confirmed by Lord Hardwicke in *Titley v. Davies*, cited in *Ex parte Carter*, Amb. 733. Vide *Fribourg v. Pomfret*, cited *Ibid.* And the rule has been confirmed at common law in a case where an assignee of a bankrupt moved to stay proceedings in ejectment on payment of the principal, interest, and costs on the mortgage in question. But it was objected by the mortgagee, that there were two other mortgages of different premises for different sums due from the bankrupt, on which the court refused to stay proceedings on the payment of the first mortgage only, and discharged the rule with costs. *Roe v. Soley*, 2 Black. 726.]]

So, if a man makes two several mortgages of several lands, and dies, and one of the mortgages is of an entailed estate, or is deficient in value, the heir of the mortgagor shall not be admitted to redeem one without the other; neither shall the mortgagor himself redeem the one, and leave the defective mortgage, but he must take both together.

Vern. 29, 245; 2 Vern. 207.

[*Stokes* mortgaged to *Charlton* for 1400*l.* Money was afterwards at different times advanced by the mortgagee, and different premises were added, and made redeemable on payment of 1900*l.* with interest. These securities were registered; and afterwards the mortgagor assigned to the plaintiff the premises first mortgaged. The defendant admitted, that there was no agreement between *Stokes* in writing or otherwise, that the last-mentioned premises should be a security for more than 1400*l.* and interest; but he insisted that the plaintiff was not entitled to a redemption without paying the whole beyond the 1400*l.*, and that registering the encumbrances was full notice of them. The decree was, that the assignee could not redeem without paying the whole.

*Cator v. Charlton*, 21st June, 1775, in the registrar's book, 1774, cited in 2 Ves. jun. 377. In *Collet v. Munden*, May 31, 1786, in the registrar's book, 1785, cited also *Ibid.* Sir L. Kenyon, upon the above authority, in the same sort of case of separate mortgages, declared that both must be redeemed. "These cases," said the Master of the Rolls, in *Jones v. Smith*, 2 Ves. jun. 377, "amount to this; that if a man makes a mortgage, and afterwards makes another mortgage for a further sum, and then assigns the equity of redemption of one, both must be redeemed; and the case of the assignee is not better than that of the original mortgagor." [And this doctrine is confirmed in *Ireson v. Denn*, 2 Cox, 425; *sed vide Willie v. Lugg*, 2 Eden, 78; *Coote on Mort.* 407.]]

A bill was filed by the widow and executrix of *James Vanderzee*, to redeem securities pledged by the testator to the house of *Moorhouse and Co.*, bankers, of which the defendants were the present partners. The case was as follows:—In the year 1778, the deceased kept an account with the house of *Moorhouse and Co.*, as bankers; and upon the tenth of August in that year, he borrowed of the then partnership 1000*l.*, (having then 400*l.* in the hands of the house,) and gave a promissory note, and deposited several bonds and other securities as a pledge for the repayment thereof. These

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securities he frequently changed, and as one was taken away, another of equal value was deposited in its room. In 1784, Vanderzee, owing the above 1000*l.*, and above 400*l.* on his banking account, the partnership required an assignment of the securities, and Vanderzee, being an attorney, prepared a bond and deed-poll for securing 1000*l.*, although there were 400*l.* then due; and he overdraw his account, after the execution thereof, and was, at his death, in 1785, indebted to the partnership in the sum of 541*l.* over and above the 1000*l.*—The bill prayed, that the plaintiff might redeem, on payment of 1000*l.* and interest only, insisting, that the deposit was made as a security for that sum only, and the rather, as a larger sum was then due, and that the defendants had no lien on the securities for any further sum; and also stated that the personal and fee-simple real estate of the testator were no more, or little more, than sufficient to pay his specialty debts, and that a bill had been filed by creditors against the present plaintiff and the heir at law, in which suit there had been a decree for the creditors to come in.—The defendants insisted, by their answer, upon a right to retain the securities to the amount of their whole demand, stating their practice to be, never to suffer a customer to overdraw his account more than 100*l.* without security, and that it was intended by the partnership, that the assignment should cover as well the balance due, and to become due from Vanderzee, on his cash account, as the 100*l.* and interest; and that the partnership always considered themselves to have a lien upon the securities for the whole debt. Lord Chancellor,—All cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking: so it would, if the specialty creditor brought the bill. I am afraid, the rule has been laid down too broad, and that there being a decree for creditors to come in, they must redeem on payment of the 1000*l.* with interest.

*Vanderzee v. Willis*, 3 Br. Ch. Ca. 91.

Sir James Cockburne and Henry Douglas, carrying on business in partnership, as West India merchants, borrowed from Joshua Smith 5000*l.*, for which they gave their joint promissory note dated April 25, 1775; and as a further security, Sir James Cockburne transferred 2000*l.* Scotch mine stock to Smith, who signed a memorandum promising to transfer the same to the order of Sir James on payment of the note. By indentures of lease and release December 11th and 12th, 1775, Sir James Cockburne, Sir George Colebrook, and John Nelson, mortgaged an estate in the island of Dominica to Thomas Rumbold, George Wilson, and Joshua Smith; and by indentures of the same date it was declared, that 10,000*l.*, part of that sum, was the property of Smith; and a trust was declared for him as to that; and the mortgagors joined in a bond to him for that sum; and Sir James Cockburne and Douglas joined in a bond to him for the interest. Sir James Cockburne and Douglas had various money transactions with Smith subsequent to 1775; and upon May 7th, 1788, Smith having then in his hands, besides the Scotch mine stock, and the joint note of the partners, several bills of exchange and notes delivered by them to him, an account was settled, and a memorandum signed by all parties, that the balance to Smith was 9246*l.* 13*s.* 7*d.*, and declaring, that that sum should carry interest from the 1st of the preceding October: and that the several bills and stock set forth in the account were paid to Smith at sundry times by the partners, “which, when paid, are to be entered to the credit of their joint or separate notes and bills.” Upon this occasion no notice was taken of the mortgage of the West India estate. In



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October, 1788, Douglas died. By indentures of March 1, 1791, Sir James Cockburne, in consideration of 500*l.* lent by Jones, transferred to him, his executors and administrators, all the said 2000*l.* Scotch mine stock, and the joint promissory note of April 25th, 1775, and a bill of exchange for 1575*l.*, dated April 6th, 1775, payable three years and a half after date, all then in the possession of Smith, upon trust, subject to the rights of Smith, for satisfaction of the said 500*l.*, and all other sums then due by Sir James Cockburne to Jones; and then to pay the surplus to Sir James, his executors and administrators. Smith having obtained judgment against the drawer and endorser upon two bills for 5000*l.* and 5250*l.* drawn by Ninian Horne upon Sir James Cockburne and Douglas, endorsed by Campbell, and delivered by Sir James Cockburne and Douglas to Smith, Horne gave Smith ten other bills and notes for 10,000*l.*, and by indentures of September 16th, 1778, Smith covenanted to stand possessed of the principal sum of 10,000*l.* secured by the West India mortgage, subject to the payment of the securities so given to him by Horne, as to one moiety for Horne, his executors and administrators; and as to the other, for such persons as should be then entitled thereto. Upon these bills and notes Smith received 4200*l.* only; and by indentures of May 26th, 1787, in consideration of 4200*l.* paid him by George Horne, he agreed to give up the remaining securities; and assigned the remaining 5000*l.* of the mortgage-money secured upon the West India estate. The bill was brought by Jones against Smith for an account of the money remaining due to the defendant in respect of the balance of the account of May 7th, 1778; and that, on payment of what should be due on that account, the defendant should transfer to the plaintiff the sum of 2000*l.* Scotch mine stock, and deliver up the joint promissory note of Sir James Cockburne and Douglas for 5000*l.*, dated April 25th, 1775, and the bill of exchange of April 6th, 1775, for 1575*l.* upon the trusts of the indentures of March, 1791. It was admitted by the answer, that it was agreed, the defendant should retain the several notes, bills and stock set forth in the account of May 7th, 1778, by way of mortgage for payment of the balance of 9246*l.* 13*s.* 7*d.*, and apply the sums he should receive on account thereof in discharge of that balance, and pay the surplus to Sir James Cockburne; and that pursuant to that agreement he subscribed a memorandum dated May 7th, 1788, acknowledging payment of the said bills and stock to him: but the defendant referred to the memorandum for certainty as to the date and contents. The answer stated, that the defendant had received interest upon the West India mortgage only to December 12th, 1776; and he claimed interest of the whole 10,000*l.* from that day to September 16th, 1778; and from that day he claimed the interest of a moiety of that sum, and of so much of the other moiety as he was entitled to under the deeds of September 16th, 1778, to May 26th, 1787; and so much of the interest of the last moiety during that period, as he was not so entitled to, and the interest of the whole 10,000*l.* from May 26th, 1787, he claimed as trustee for Ninian and George Horne, and Campbell; and he insisted that the securities, the redemption of which was sought by the bill, could not be redeemed without paying those arrears of interest upon the West India mortgage; which was the only question. The Master of the Rolls,—It is determined, that in the case of two mortgages both must be redeemed; but as to sums advanced on other securities, a mortgagee cannot tack those to his mortgage, and insist on a redemption of the whole. Here is a mortgage, in which Sir James Cockburne is one of three mortgagors, and the defendant one of three mortgagees: after-

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wards, the former and his partner pledge with the defendant bills and notes for payment of an account current between them, of which account the money due upon the mortgage makes no part. If they were deposited expressly for one purpose, is there any pretence to say, the money was advanced upon security of the mortgage; and that he would not have advanced any more money but on security of the mortgage? I could not permit him to say that. What confusion would arise, if upon a bill of redemption by the mortgagors they were not to redeem without paying what was due upon the distinct transaction with Sir James Cockburne and Douglas? They are transactions totally distinct. Nothing has happened since to make any variation. This is not a case in which the plaintiff comes to take out of a mortgagee the legal estate he has acquired; but he comes to have these personal securities; the debt for which they were pledged being discharged. The whole transaction proves, there was no intention of tacking at the time; and if the defendant ever could, he waived it in 1778. That transaction was an acknowledgment by him, that he had the legal possession for one sum; and then, according to *Green v. Farmer*,<sup>(a)</sup> he cannot set up another. Therefore, these securities must be delivered over to the plaintiff on paying what is due upon that account in 1778. I rather think the defendant ought to have his costs; for it is not a frivolous point; therefore, let the account be directed, and costs reserved.

*Jones v. Smith*, 2 Ves. jun. 372. (a) 4 Burr. 2214, and 1 Bl. R. 651.]

If a man has a debt owing to him by mortgage, and another on bond from the same person, he cannot tack them together against the (b) mortgagor, but he shall be let into a redemption without payment of both; because the land in his hands is chargeable with the bond even at law. And (c) since the statute against fraudulent devises, the devisee of the equity of redemption is in the same case with the heir, and cannot redeem without payment of both; because the statute makes such devise void as against creditors, and then the devisee stands in the place the heir must have done if no devise had been made.

*Abr. Eq. 325*, *Challis v. Casborn*; *¶cont.* *Bingham v. Gregg*, Barn. 182; *Felton v. Ash*, *Ibid.* 177; and see *Powell*, 348 a, note.¶ (b) In *Vern. 244*, it is held, that the mortgagor himself must pay both bond and mortgage. And in *Prec. Chan. 419*, it is said by my Lord Chancellor, that if a sum be secured by a mortgage of lands, the mortgagor shall not be admitted to redeem after the day of payment is lapsed, without paying likewise all that is due to the mortgagee on notes or simple contract; but that it is otherwise if such subsequent debts had been secured by bond. (c) But before the statute, the devisee of the equity of redemption was not obliged to pay both. *Abr. Eq. 325*; *Prec. Ch. 89*.

Also it hath been held, that if the heir of the mortgagor alien the lands, the purchaser, on a bill brought by him for a redemption after forfeiture, shall not be obliged to pay both the mortgage-money, and also a bond-debt due from the mortgagor; for though the heir must have paid both in such a case, yet the reason of that is, because the heir is expressly bound, and his person is become debtor, and not the lands, and, consequently, the lands in the hands of the alienee can be charged with nothing but what is an immediate *lien* thereon, which the bond is not.

*Prec. Ch. 511*, *Coleman v. Wince*.

So, if a man, possessed of a term for years, mortgages it, and dies indebted to the mortgagee in a bond-debt, if the executor brings a bill to redeem, he must pay both; because the equity of redemption of the term is assets in his

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hands; but if he alien the equity of redemption of his term, though he shall be answerable for the value, as it is so far a *devastavit*, yet the purchaser shall be charged with no more than was immediately borrowed upon it.

Prec. Ch. 512, *per cur.*

If a bill is brought by an heir at law, or any other person, against a mortgagee, whereby the party would avoid the mortgage, under pretence his ancestor was only tenant for life, and he seeks for a discovery of deeds and writings to avoid the title of the mortgagee, he shall never have such a discovery, unless he, by his bill, submits to confirm the title, and then he shall.

Father, tenant for life, remainder to the son in tail; the father mortgages the land, and dies; the mortgagee, by a third hand, procures the son to borrow money of him, as tenant in fee, on a mortgage of the premises: this shall not inure to make good the money lent the father; for though the mortgagee hath got the legal estate, yet it is only pledged for money lent to the son, and the money lent to the father was on another estate, to which the son is an absolute stranger; and therefore the court will not compel the son to pay the debt of the father, from whom he did not claim. But, if the tenant in tail had mortgaged without notice of the entail, and the mortgagee had got the deed into his possession, equity would not compel him to discover such deed to overthrow his own possession, since his estate arises upon a valuable consideration, and the heir in tail claims under the ancestor who made the mortgage, especially if the mortgage work a discontinuance.

2 Chan. Ca. 23, *Bromley v. Hammond*; ||*cont.* *Margrave v. Le Hooke*, 2 Vern. 207. ||

So, where a lunatic, before he became such, made a mortgage of a good part of his estate for 50*l.*, and the committee transferred this mortgage and took up 300*l.* or 400*l.* more upon it; my Lord Chancellor declared the mortgage should stand a security for the 50*l.* only.

Vern. 262, *Foster v. Merchant*.

[A mortgage being assignable, a purchaser shall hold it against *the mortgagor or his heirs* for the sum due on the mortgage, although he bought it for less than was due, or for less than it was worth: for he stands in the place of the mortgagee who assigned, and who might have given it to him *gratis*. And what was due will be the measure of allowance, not what was given, for that might be more than it was worth as well as less; and he that runs the hazard if a loss happens, ought to have the benefit in case it turns to advantage. Thus, where A mortgaged his lands to B, and C, a stranger, bought the interest for less than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem, the question was, Whether C should be allowed more than he actually paid? And the Lord Chancellor said, that this case had neither point nor edge, for there was no colour why, when the heir came to redeem, he should not pay the whole money due on the mortgage: for that, if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himself.

*Williams v. Springfield*, 1 Vern. 476; 1 Salk. 155, 4; ||*sed vide* *Morret v. Paske*, 2 Atk. 54, and 5 Ves. 620, n. (a); *Phillips v. Vaughan*, 1 Vern. 336; *Baker v. Kellet*, 3 Rep. Ch. 23; ||*S. C.* *Nelson*, 117. ||

But where a man dies in debt and under several encumbrances, namely, judgments, statutes, mortgages, &c., and the *heir at law* buys in any of them that are of the first date; if creditors, who have the latter securities,

## MORTGAGE.

H. ~~Encumbrances~~ and Foreclosure. (Time for Redeeming.)

When there are several encumbrances brought in shall not stand in their way to be paid for them. For a creditor has equal equity in the land, and the gain of the latter to supply the loss of the former is making both equal; and therefore the gain the heir or legatee of the whole money due on the encumbrance were allowed to make up the loss of the other encumbrancers.

*See also* 1 Vern. 479; 1 Eq. Ca. Abr. 330, 3; 1 Salk. 155.

When a man is a trustee, executor, or agent, compound debts or mortgages are due upon them, he shall not take the benefit of himself, but the creditors and legatees shall have the advantage of them; and if they want it, the benefit shall go to those entitled to the same.

*See also* 1 Vern. 479; 1 Salk. 155; 3 Atk. 54; {6 Ves. J. 625, *Ex parte Lawrence*; 1 Vern. 479, *Ex parte James*;}.

When a mortgagee in fee died, and the mortgagee bought in the mortgagee's whole interest, it was decreed, that the heir of the mortgagor, on the redemption, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after his money paid.

*See also* 1 James's 3 P. Wms. 251, note A.

In the case of *Finch and Sharpe*, one as a guardian to an infant took in a mortgage, and the Lord Keeper, it is said, was of opinion, that as the profits received out of the mortgaged lands, the guardian should be allowed to be in possession as mortgagee, and not as guardian. But the court gave a *major*, and the law seems to be otherwise; for when the guardian had sold the land, it was decreed it should be for the benefit of the infant, and that case turns upon the same principle as that by *Finch and Sharpe* must be governed.

*See also* *Stewart v. Powell v. Glover*, 3 P. Wms. 251, note A.

The same seems to be the same if a stranger purchase, as against the mortgagee, or the real purchasers.

*See also* 1 Vern. 476. [See *vide* *ant.* 3 Atk. 54; 5 Ves. 260, *ant.*]

When a master's account report to whom the account in question was due, was determined by the court, that an heir or any other person, not being a real purchaser, be allowed more on any account, than what he paid for it, without regard to what he really paid.

*See also* 1 Vern. 476.

When a person is an encumbrance on an estate charged with portions, he shall be allowed no more than what he really paid.

*See also* 1 Vern. 476.

When a person buys in encumbrances to protect others to which he is entitled, the whole money due shall be allowed on account, though it was purchased for less.

*See also* 1 Vern. 476.

*It is said that the Redemption must be.*

*When a man makes a feoffment in fee, upon condition, that if the feoffor*

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paid a sum of money at a day he should re-enter at law ; if the money was not paid at the day, the estate was gone for ever. This made pledging, according to the rules of the common law, very insecure, and also made it necessary for a court of equity to interpose. For though the words of the condition bind down the construction at common law to the payment at the precise day, yet a trust is supposed between the mortgagor and mortgagee, that in case the payment be afterwards made, the mortgagor may have up the lands ; and this the rather, because the land is esteemed only a pledge for money, and it would be a very unconscionable thing, that the mortgagee should take advantage of the non-payment at the precise day, when lands are generally pledged but for half value. And in this the chancellors, who were ecclesiastics, were more generally confirmed from the reasonings of the civil law hereinbefore mentioned.

Chan. Ca. 20.

But though a redemption has been allowed, yet no time has been limited when the same may be. But when a man comes in at an old hand, it hath been sometimes decreed that the possessor shall account no farther than for the profits made in his own time, to discourage the stirring in such dormant titles. However, it is the common doctrine in the courts of equity, that there is no time limited ; for it is not within the statute of limitations, and the courts of equity are tender of settling any set time ; because a man can never be injured, if he receives principal, interest, and costs ; and the proprietor is injured if he parts with his possession under the true value. Sometimes, indeed, the court hath allowed length of time to be pleaded in bar, where the mortgaged estate hath descended, as a fee, without entry or claim from the mortgagor, and where the possessor would be entangled in a long account.

Chan. Ca. 102 ; Chan. R. 97, 184, 206 ; Abr. Eq. 313, 314 ; 2 Vern. 377.

And therefore, at a hearing before my Lord Keeper, assisted with Justices Vaughan and Turner, concerning the redemption of a mortgage, which had been made above forty years, my Lord Keeper declared, that he would not relieve mortgages after twenty years ; (a) for that the statute of limitations did adjudge it reasonable to limit the time of one's entry to that number of years, unless there are some particular circumstances that may vary the ordinary case ; as infants, femmes covert, &c. who are provided for by the very statute ; though these matters in equity are to be governed by the course of the court, and it is best to square the rules of equity as near the rules of reason and law as may be.

2 Vent. 340, *Ewre v. White*. [(a) As to this rule now settled in equity, see *Beckford v. Wade*, 17 Ves. 99 ; *Hicks v. Cooke*, 4 Dow. P. Ca. 27 ; *Medlicot v. O'Donnell*, 1 Ball & B. 156 ; *Bond v. Hopkins*, 1 Scho. & Lef. 427 ; *Hovenden v. Annesley*, 2 Id. 632 ; and remarks of Plumer M. R., 1 Jac. & W. 63.]

A bill was exhibited to redeem a mortgage ; to which the defendant demurred ; (b) because by the plaintiff's own showing, it appeared the mortgage was sixty years old : but, upon argument, the demurrer was overruled ; because it was charged in the bill, that the mortgagor agreed the mortgagee should enter and hold till he was satisfied, which is in the nature of a (c) Welsh mortgage.

Vern. 418, *Orde v. Heming*. [(b) Whether length of time can be taken advantage of by way of demurrer, see *Jenner v. Tracey*, and *Belch v. Harvey*, 3 P. Wms., note (B). *Frazer v. Moor*, Bunb. 54 ; *Saunders v. Hard*, 1 Ch. Ca. 184 ; *Aggas v. Pickereil*, 3 Atk. 225 ; *Beckford v. Close*, cited in 3 Br. Ch. R. 644 ; *Edsell v. Buchanan*,

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2 Ves. jun. 83.] [But it seems now settled that such a demurrer is good. *Hardy v. Reeves*, 4 Ves. 478; *Hodle v. Healey*, 1 Ves. & B. 536; *Foster v. Hodgson*, 19 Ves. 184; and see 2 Scho. & Lef. 638.] (c) In a conveyance by lease and release there was a proviso, that if A, his heirs or assigns, should, on Michaelmas day then next ensuing, or any other Michaelmas-day following, pay to B, his heirs or assigns, the sum of 300*l.* (the mortgage-money,) and all arrears of rent or interest which should be then due, then the said conveyance was to cease, without any other covenant for payment of the money: this was held to be a Welsh mortgage, being in nature of a conditional purchase, subject to be defeated on payment, by the mortgagor, or his heirs, of the sum stipulated between them at any Michaelmas day, at the election of the mortgagor, or his heirs; and that here being an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, the same could not be forfeited at law, like other mortgages; and this was said to be a common practice in Wales (proceeding from their pride,) being done with a design to keep the estate for ever in their family. *Prec. Chan.* 423, 424. [In the late case, *Fenwick v. Reed*, 1 Mer. 114, the court fully recognised the security by Welsh mortgage, and held that time was no bar to redemption in such cases, unless twenty years had elapsed after payment of principal and interest by perception of profits. *S. C.* 5 Barn. & A. 232; 6 Madd. 7; and see *Cooke v. Soltau*, 2 Sim. & Stu. 154.]

[A, in 1699, having borrowed 50*l.* of B, conveyed several houses to the use of B and his heirs, until he should have received by the rents and profits thereof the 50*l.* with interest, and all other sums by him advanced to the mortgagor; and after payment by such rent of the 50*l.*, and all such sums as should be advanced, then to the use of A for life, with remainder over. No application was made to redeem until 1740; and it was held, on a question, whether this mortgage might be then redeemed, that the estate was then a redeemable interest, and that no bar arose from length of time. For it was said, that this differed from a common mortgage, this being a conveyance of the inheritance, for securing the money lent, or any other sum advanced by the mortgagee, in trust that the mortgagee should continue in possession till, by perception of the rents and profits, he should be satisfied the principal and interest upon such sums as he had already lent, or should lend, and subject thereto in trust for the mortgagor, &c. Now there never could be a forfeiture under this deed, because the mortgagee was only in the nature of a tenant by *elegit*; and as soon as his principal and interest was satisfied by being paid off, or by perception of rents and profits, the estate ceased in B, and A, or those claiming through him, might have brought an ejectment; nor would any bar have arisen from length of time, unless the statute of limitation had run by the mortgagee's continuing in possession twenty years after the money had been paid off. And the mortgagor in such case may also come into a court of equity for an account of the profits received, as on an *elegit*, and to have the surplus, if any, after discharging the mortgage, paid over to him; and in such cases there is nothing for the statute of limitations, or the rule adopted in equity by analogy to operate upon, for there is no forfeiture. But it was observed in the preceding case, that if, after the account should be taken in Chancery, it should appear that the mortgage was satisfied by perception of profits twenty years before, and that the mortgagee had continued in possession from that time, the statute of limitations would run.

*Yates v. Hambly*, 2 Atk. 360; [1 Mer. 125.]

But in the case of *Hartpole v. Walsh*, where H, in consideration of 600*l.* lent him by W, conveyed estates to him in fee, subject to a proviso, that "the conveyance should be void, whenever H, his heirs, executors, administrators, or assigns, should, on any last day of June or December, pay unto W, or his heirs, the sum of 600*l.*;" and it was agreed by the indenture, that W

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and his heirs should receive the yearly rent of the premises in lieu of his interest, with a view to which possession was delivered to him; and afterwards H, in consideration of 2300*l.* paid by W, granted and conveyed the premises comprised in the former mortgage, together with others, to him, his heirs and assigns, and covenanted that, whenever W should give to him, his heirs or assigns, eighteen months' notice by letter in writing, requiring payment for the 2300*l.*, H, his heirs or assigns, should pay the same with interest within eighteen months after such request; and W was in like manner let into possession of the last-mentioned premises; a bill for redemption brought, after the lapse of one hundred years, was dismissed, and that decree for dismissal affirmed in the House of Lords.

Hartpole v. Walsh, 4 Brown's Parl. Ca. 369.

Where a bill was to redeem a mortgage made in 1642, it appeared the mortgagee entered in 1650, and there were three descents on the defendant's part, and four on the part of the plaintiff; but the length of time being answered for the greatest part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686.

Proctor v. Cowper, 2 Vern. 377; [Pre. Ch. 116.]

Where a mortgage was made in 1713, and the clerk to the solicitor for the mortgagor, in order to pay off the mortgage, settled an account, in 1730, of what was due for principal and interest, and no farther proceedings were had; yet that was held by Lord Hardwicke, on application in 1742, to save the right of redemption.

Anon. 2 Atk. 333.]

A mortgage was made to A in the year 1639, to indemnify him against debts for which he was engaged for the mortgagor; and in the year 1649, he entered into the mortgaged premises, and had possession, and afterwards conveyed away several parts of the mortgaged premises to several persons; and several sales and marriage-settlements had been made on them. In the year 1663, a bill was brought to redeem; but all the assignees were not parties; and a decree to account, and a report made, and exceptions taken to that report; and so it rested for about eighteen years; and then another bill was brought; and another decree to redeem; but no prosecution upon it from the year 1676 till 1697, and then the plaintiff, having purchased the equity of redemption of those lands (*inter alia*) from the heirs of the mortgagor, brought his bill to redeem. The objections against it were the length of time, the many derivative titles that had been made, and when no suit was depending, and the difficulty of taking the account. To which it was answered, that there had been fresh pursuits, and that the difficulty of the account had been occasioned by the mortgagees themselves, and that there were infants in the case. My Lord Keeper held, there ought to be no redemption; and that length of time excuses the mortgagee for taking the estate as his own, and using it accordingly; and none that have come under him have done amiss; and though there were infants in the case, yet the time having begun on the ancestor, it shall run even upon infants, as it is at law in the case of a fine; and there is one great objection to a redemption in this case, that it does not appear that the plaintiff paid any thing for this equity of redemption, only had it thrown into his bargain.

2 Vern. 418; Abr. Eq. 314, Saint John v. Turner.

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The plaintiff's grandfather, in the year 1686, had made a mortgage of the estate in question, which was proved to be about nine or ten pounds *per annum*, for securing about 100*l*. In the year 1696 this mortgage was assigned over to the defendant; who by agreement was then let into possession, and had continued so ever since, and was now about ninety years of age: the mortgagor died several years since, leaving the plaintiff's father, his eldest son and heir, of full age, who likewise died in the year 1714, leaving the plaintiff his eldest son and heir, then about twelve years of age; who brought this bill for an account, and to be let into a redemption of the estate in question, of which the defendant had been in possession thirty-three years, and so was greatly overpaid his principal and interest. But my Lord Chancellor dismissed his bill; and ordered it to be entered down as one of the reasons for dismissing the bill, that the plaintiff had no remedy by ejectment at law to recover the possession, being barred by the statute of limitations; and he thought that a reasonable guide for this court to follow, as to the redemption in equity; and though the plaintiff was an infant at his father's death, yet the computation of time began long before, when there was no infancy in the case, and therefore will run on against infants after. (a)

*Abt. Eq. 315, Knowles v. Spence.* (a) As twenty years' possession will bar an entry or ejectment, unless in cases of infancy, coverture, imprisonment, or being beyond sea, (but not absconding,) so will it bar a redemption. *Jenner v. Tracy*; *Belch v. Harvey*, 3 P. W. 288. After the disability removed, ten years should be the rule in equity, as it is in the proviso in the statute of limitations. *Per Talbot, C., Ibid.*

¶ If the mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem after twenty years from such entry.

*Harrison v. Hollins*, 1 Sim. & Stu. 471; and see *Corbett v. Barker*, 1 Anst. 138, (3 *Ibid.* 755.)] β The general rule in equity is, that there may be a redemption within twenty years; but upon equitable circumstances, the right of redemption may be allowed after a much longer time. *Ross v. Norvell*, 1 Wash. 14. See *Moore v. Cable*, 1 Johns. Ch. 594; *Lamar v. Jones*, 3 Har. & M'H. 328; *Hodle v. Healey*, 6 Mad. 181; *Raynor v. Castler*, 6 Mad. 274; *Dexter v. Arnold*, 3 Sumn. 152; *Wells v. Morse*, 11 Verm. 9; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Slee v. Manhattan Co.*, 1 Paige, 48; *Fenwick v. Macey*, 1 Dana, 279; *Harrison v. Hollins*, 1 Sim. & Stu. 471; *Hughes v. Edwards*, 9 Wheat. 489.g

[Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years, will take the case out of this rule; as, by devising the money in case the mortgage should be redeemed, or exhibiting a bill to foreclose.

*Orde v. Smith*, Sel. Ca. Ch. 9, *supra*.] β In a case where, by an agreement endorsed on the mortgage, negroes who were mortgaged were left in the possession of the mortgagees, and were to continue there in lieu of interest until the debt should be paid, no length of time will bar the equity of redemption. *Administrators of Wurtz v. Thynes*, 2 Hill's Ch. 178.g

So, a man taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule that a mortgagor shall not redeem after forty years.

¶ *Hansard v. Hardy*, 18 Ves. 455.]

¶ So, also, if the mortgagee treat the estate as redeemable in a mere private account kept by himself of the profits. But the accounts kept by the receiver of the estate will not amount to such an acknowledgment, nor will a mere demand by the mortgagor without process, or acknowledgment by the mortgagee, be sufficient.

*Fairfax v. Montague*, cited 2 Ves. jun. 84; *Campbell v. Beckford*, cited 4 Ves. 474;



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*Lake v. Thomas*, 3 Ves. 17, 22; *Barron v. Martin*, Cooper, C. C. 189; 1 Ves. & Beam. 540; 19 Ves. 327.

A conveyance by the mortgagee or his heir of the lands subject to the equity of redemption is a clear acknowledgment, although it is said that the words "subject to the subsisting equity of redemption, *if any*," will not have that effect.

*Smart v. Hunt*, 4 Ves. 478, n.; *Hardy v. Reeves*, Ibid. 480.

Parol evidence of the acknowledgment is admissible; but it must be clear and unimpeachable.

*Perry v. Marston*, 2 Bro. C. C. 397; *Whiting v. White*, 2 Cox, R. 295.

Acknowledgments of the mortgage by recitals in deeds, often render estates redeemable which otherwise would not be so. And an acknowledgment by the mortgagee, or those claiming under him within twenty years, will have this effect, though the transaction be with third persons, and the mortgagor and his heirs are not party to it.

2 Scho. & Lef. 295; *Hansard v. Hardy*, 18 Ves. 455; *Hardy v. Reeves*, 4 Ves. 466; *Price v. Copner*, 1 Sim. & Stu. 347.

So, an acknowledgment of the mortgage as a redeemable interest in a letter to a friend, or in a settlement between third parties, or by an assignment treating the estate as subject to redemption, will keep alive the equity of redemption.

*Fenwick v. Reed*, 6 Madd. 8; 2 Cox, Ca. 294; *Smart v. Hunt*, 4 Ves. 478, n. (a).||

A surrender was made by P to M, the reconveyance to be to such uses as P should direct, or to himself in fee. There was a subsequent surrender to the use of himself for life, remainder to his wife for life, remainder to M in fee, subject to the trusts of the former conveyance. Under these conveyances P enjoyed the estate without paying interest until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold, and the wife joined in the conveyance. She dying soon after, M took possession, and held the same without any account to 1765, and from thence to 1779 no act was before the court to show under what title M held. In 1776 a bill was filed to redeem. In the first answer put in 1780, M denied that he held as a mortgagee, and claimed to hold by title under the second deed. In the same year the conversation passed, which was considered as a declaration, that M held only as a mortgagee. It was a conversation between the son of P and M, in which M asked the son, *why his father did not pay the money; to which he answered, because he was so poor that he could not pay it. The reply of M to this was, he was ready to settle the matter without suit.* An amended bill was afterwards filed; and the cause was heard at the Rolls, and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancellor, the decree was reversed, on the ground that the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage: as otherwise the mortgagee would have got the equity of redemption for nothing, and the P's would have estates for life, subject to the mortgage-money, which was more than they were worth: the words "subject to the trusts" must therefore mean, "subject to the life-estates of the mortgagor and his wife." Then if it was considered as matter of title, the rule did not apply. If M had been the surrenderor, (which he ought to have been,) it could not have been, that a conversation should defeat a clear act. Then there was evidence of a clear possession in P and his wife. After her death

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the M's took the estate, and treated it as their own. On the whole the Chancellor was of opinion, that the surrender was an instrument of title; and the decree was reversed.

*Perry v. Marston*, 2 Bro. Rep. Chan. 397. [See as to this case, 2 Cox, Ca. 290; and that parol evidence is admissible to prove oral acknowledgments by the mortgagee of a subsisting equity of redemption within twenty years, provided such evidence be clear and unequivocal, see *Whiting v. White*, *Cooper's Rep.* 1; S. C., Cox, Ca. 290; *Reeks v. Postlethwaite*, *Coop.* 161; *Barron v. Martin*, *Ibid.* 189.]

So, where a bill was demurred to, because it was to be relieved against a mortgage after forty-one years, yet, on a promise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed; because, though forty-one years had passed since the mortgage, yet but fourteen had elapsed after the time agreed for redemption.

*White v. Pigeon*, *Tohill*, 232.

So, a mortgage was decreed to be redeemed upon the foot of an account stated previous to the mortgagee's entering upon the premises, notwithstanding he had been in possession forty years; the husband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about seven years before the bill for redemption came to a hearing, for the purchase of the equity of redemption. For although, for reasons sufficiently evident in the case, the court refused to decree a specific performance of that agreement, yet it seems to have been considered as an admission by the mortgagee, that at that time he conceived the mortgagor had a right to redeem, which occurring within seven years of the time of exhibiting the bill, brought this case within the reasoning of that immediately preceding.

*Conway v. Shrimpton*, 1 Bro. Parl. Ca. 309; Vin. vol. 5, p. 505, Ca. 5; 2 Eq. Ca. Abr. 596, Ca. 10, 738, Ca. 2.

[Husband and wife, seised in fee in right of the wife, mortgaged for a term of years, and levied a fine to the use of the mortgagee, his heirs and assigns, subject to the proviso for redemption. They afterwards conveyed the equity of redemption by lease and release to the mortgagee. The mortgagee remained in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy, from whom he had gotten the conveyance. The heir of the wife was allowed to redeem notwithstanding this lapse of time. By attending to the different rights of the mortgagee it appears, that he stood in the place of the tenant by the curtesy of the equity of redemption; for he claimed to hold under him by the last conveyance, and immediately upon taking it he entered into possession: in that character it was his duty to keep down the interest of the mortgage: uniting these two characters, he is to be considered as having supported the different rights and discharged the duties of each. In the general case, a presumption arises from no payment of the surplus rents being made, nor account delivered for so long a period of time as twenty years: here the presumption cannot arise, because it was the same person to pay and to receive: the case does not therefore fall within the general rule.

*Corbet v. Barker*, *Anstr.* 138, 755.]

Upon the same principle, a redemption was decreed upon a bill filed fifty-five years after the original mortgage, and forty-seven years after the mortgagee got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusal by four different answers to come to an account upon the foot of the mortgage, and to redeem. For, the non-redemption for thirty-eight years of the time elapsed being accounted for, by

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having been occupied in different suits brought by the contending parties, a period of seventeen years only had run out between the time of settling that dispute and the exhibiting the bill to redeem.

*Palmer et al. v. Jackson et al.*, 5 Bro. Parl. Ca. 194.

And if the mortgagee *submit* to be redeemed, time will be no bar. Thus, where a bill was brought to redeem after the mortgagee had been in possession from 1707 to 1732, the year in which the bill was filed; and the defendant (it being a family affair) submitted by his answer to be redeemed, notwithstanding the length of time; Lord Hardwicke, though he said he saw no colour for the redemption, yet, on the defendant's submission, decreed an account of what was due for principal, interest, and costs, and directed the plaintiff to pay the same in six months after the master's report, or, in default, the bill to be dismissed without costs.

*Proctor v. Oates*, 2 Atk. Rep. 140; [and see *Seymour v. Tindell*, Finch's Rep. 284.]

Time will be no bar, if the mortgagor remain in possession. Thus, a person had chambers in Gray's Inn, and mortgaged them in 1687, but continued the possession till 1700; at which time an order of the Bench was made to deliver possession of the mortgaged premises to the mortgagee; upon part of which he entered; but as to the other part, the mortgagor continued in possession till 1708, when he died leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had possession of the whole. A bill was brought to redeem in 1726, and it was so decreed at the Rolls, and the decree was affirmed by Lord Chancellor King, who said nothing was more clear than that, if the mortgagor was in possession of any part, he should be admitted to redeem the whole; for part of the chambers he might redeem as being in possession thereof, and part he could not, separately from the whole; therefore he should redeem the whole. If the mortgagee were in possession for twenty years, and no interest paid, there should be no redemption allowed. In this case the mortgagor was in possession of part till 1708; from 1708 till 1714, the plaintiff was an infant, so that was accounted for, and from that time it did not amount to twenty years.

*Rakestraw v. Brewer*, Sel. Ca. Ch. 55; Mosley, 190.

#### 7. *Of the Manner of Redeeming and Foreclosing.*

The methods of redemption and foreclosing being dilatory, expensive, and inconvenient, not only to the mortgagee but also to the mortgagor, the same seems now remedied by the 7 G. 2, c. 20, which reciting, that whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay money secured by such mortgages, and for performing the covenants therein contained; and likewise commence suits in his majesty's courts of equity to foreclose their mortgagors from redeeming their estates; and the courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal money, and interest due on such mortgages, and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a court of equity for that purpose; in which case the courts of equity do not give relief until the hearing of the cause; for remedy thereof, and to obviate all objections relating to the same, it is enacted, "That where any action shall be brought on any bond for the payment of the money secured by such

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mortgage, or performance of the covenants therein contained; or where any action of ejectment shall be brought in any of his majesty's courts of record at Westminster, or in the court of sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or Durham, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his majesty's courts of equity, in that part of Great Britain called England, for or touching the foreclosing or redeeming such mortgaged lands, tenements, or hereditaments; if the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant (a) or defendants in such action, shall, at any time pending such action, pay unto such mortgagee or mortgagees, or, in case of his, her, or their refusal, shall bring into court, where such action shall be depending, all the principal money and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity, upon such mortgage, (such money for principal, interest, and costs to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose,) the money so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest, as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings in his, her, or their custody, relating to the title of such mortgaged lands, tenements, and hereditaments, to such mortgagor or mortgagors who shall have paid or brought such moneys into the court, his, her, or their heirs, executors, or administrators, or to such other person or persons as he, she, or they shall for that purpose nominate or appoint."

7 G. 2, c. 20. For the more easy redemption and foreclosure of mortgages, ||vide 13 Ves. 560; 3 Ves. & B. 15. (a) The clause only extends to cases where the mortgagor appears and defends. But if the mortgagee recovers in an undefended ejectment against a tenant of the mortgagor, the court will, on payment of costs, set aside the judgment, that the mortgagor may defend as landlord, and be in condition to apply to the court to stay proceedings under the statute. *Doe d. Tubb v. Roe*, 4 Taunt. 887.]

§ 2. "And where any bill or bills, suit or suits, shall be filed, commenced, or brought in any of his majesty's courts of equity in that part of Great Britain called England, by any person or persons having or claiming any estate, right or interest in any lands, tenements, or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the defendant or defendants in such suit or suits (having or claiming a right to redeem the same) to pay the plaintiff or plaintiffs in such suit or suits the principal money and interest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum or sums of money due on any annuities or specialty, charged or chargeable on the equity of redemption thereof; and, in default of payment thereof, to foreclose such defendant or defendants of his, her, or their right or equity of redeeming such mortgaged lands, tenements, or hereditaments; such court and courts of equity

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where such suit or suits shall be depending, upon application made to such court by the defendant or defendants in such suit, having a right to redeem such mortgaged lands, tenements, or hereditaments, and upon his or their admitting {<sup>1</sup>} the right and title of the plaintiff or plaintiffs in such suit, may and shall, at any time or times before such suit or cause shall be brought to hearing, make such order or decree therein as such court or courts might or could have made therein, in case such suit or cause had then been regularly brought to hearing before such court or courts; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit; any usage to the contrary thereof in anywise notwithstanding."

{No order can be made under this section of the statute, if the bill is not confined to a mere foreclosure, but sets up also another distinct demand, praying a satisfaction in respect of that, and that the estate may be a security for both. 7 Ves. J. 489, *Bastard v. Clark*. {<sup>1</sup>} A reference under this statute must proceed on an admission of the principal and interest due upon the mortgage; the master cannot receive evidence as to what is due. 4 Ves. J. 105, *Huson v. Hewson*.} [If the bill embrace any other object distinct from the foreclosure of the mortgage, an order of reference cannot be made under this statute. *Bastard v. Clark*, 7 Ves. 489. The application for the reference in equity must be made before the mortgagee is entitled to sue out execution at law. *Amis v. Lloyd*, 3 Ves. & B. 16. And it will not be granted if the mortgagor be in contempt. *Hewitt v. M'Carthy*, 13 Ves. 560. The reference under the statute must proceed on the admission that the principal and interest contained in the foreclosure bill are due, and the master cannot admit evidence to show the contrary. *Huson v. Hewson*, 4 Ves. 103. The time appointed for payment of the mortgage-money may be enlarged under the statute in like manner as if the cause were brought to a hearing. *Wakerell v. Delight*, 9 Ves. 36; *S. C. Coop.* 27. Where no mention was made in the bill, of proceedings at law, the court refused to direct the master to take into consideration costs at law, but allowed the bill to be amended in that respect. *Millard v. Magor*, 3 Madd. 433. It seems that this statute gives no new powers to courts of equity, but only to courts of law; and a court of equity will accordingly stay proceedings in cases not within the statute, if the defendant will submit to the same decree as the plaintiff would be entitled to at the hearing. *Praed v. Hull*, 1 Sim. & Stu. 331. Where the mortgagor becomes bankrupt, pending a suit for foreclosure, and a supplemental bill is filed against the assignees by the mortgagee, the court will not, on application of the assignees alone, make an immediate decree under the statute. *Garth v. Thomas*, 2 Sim. & Stu. 188.]

§ 3. Provided always, "That this act, or any thing herein contained, shall not extend to any case where the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned, by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent encumbrancer; any thing in this act to the contrary thereof in anywise notwithstanding."

[On a motion to stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on the latter paying principal, interest, and costs, it appeared that the mortgagor five years before, by agreement under seal, in consideration of a certain sum, had agreed to convey the estate to the

# MORTGAGE

(Selling Proceeds.)

THE MORTGAGOR AND THE LENDER OF MONEY DUE FROM THE MORTGAGOR TO THE MORTGAGEE IN THE PURCHASE-MONEY SO TO BE PAID; THE MORTGAGOR'S OBLIGATIONS AND DEEDS MADE TO THE MORTGAGOR TO COMPLY WITH THE MORTGAGE. It was contended therefore, that, under the statute in the case of *W. & L. 20*, § 3, the mortgagor had no right to the proceeds of the mortgage. And so thought the court.

—*See* *W. & L. 20*.

THE COURT THEN SAID, WHERE THE LIKE OBJECTION WAS MADE TO SUCH A MOTION, IT WAS REJECTED, THE REDEMPTION, AND THAT AFTER TIME TAKEN TO CONSIDER THE MATTER, IT APPEARED THAT THE MORTGAGEE HAD NOT TENDERED TO THE MORTGAGOR A CONVEYANCE IN EXECUTION, AND THAT NO BILL IN EQUITY WAS

—*See* *W. & L. 20*.

WHERE A MORTGAGEE WHO HAD GOTTEN POSSESSION BY EJECTMENT SUED AT LAW FOR THE REDEMPTION OR NON-PAYMENT, AND WAS PROCEEDING IN A SUIT IN EQUITY TO RESTRAIN A MORTGAGOR FROM PROCEEDING AT LAW: BUT THE COURT SAID, THE PLAINTIFF IS REGULAR IN HIS PROCEEDINGS; WE CANNOT DENY HIM THE BENEFIT OF HIS ACTION, UNLESS THE DEFENDANT WILL BRING IN THE MORTGAGE.

—*See* *W. & L. 20*; *and vide* *Schoole v. Sall*, 1 Scho. & Lef. 176.]

IN A BILL BROUGHT TO REDEEM A MORTGAGE OF LONG STANDING, AN OBJECTION WAS MADE FOR WANT OF PARTIES: NAMELY, THAT AS THERE HAD BEEN AN ABSOLUTE CONVEYANCE MADE OF THIS ESTATE BY THE MORTGAGEE WITHOUT ANY CLAUSE OF REDEMPTION, WITH SEVERAL LIMITATIONS OVER, THE PERSONS IN REMAINDER UNDER THIS CONVEYANCE OUGHT TO HAVE BEEN PARTIES. *Et per curiam*,—When a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, then it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts to make them parties. But, where the redemption depends upon equitable considerations, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

—*See* *W. & L. 20*.

THE ELDER, AND A THE YOUNGER, (HIS SECOND SON,) BY SURRENDER, CONVEYED A FEUDAL COPYHOLD ESTATE (AFTER THE DECEASE OF H THE ELDER) TO B IN FULL SURRENDER TO REDEMPTION ON THE PAYMENT OF 30*l.* AND INTEREST, AND B WAS ADMITTED TENANT TO THE LAND. THE ESTATE WAS AFTERWARDS CHARGED WITH A MORTGAGE LENT TO H THE ELDER, AND H THE YOUNGER, BY B. THEN H THE YOUNGER, WHO SURVIVED HIS FATHER, DEVISED THE ESTATE TO S H, SUBJECT TO THE MORTGAGE, AND DIED. AFTERWARDS S H SURRENDERED THE SAME ESTATE, SUBJECT TO THE MORTGAGE, TO F IN FEE, TO SECURE THE REPAYMENT OF A SUM BORROWED BY HIMSELF. AND BY A DEED BEARING EVEN DATE WITH THE LAST- MENTIONED SURRENDER, THE USES THEREOF WERE DECLARED TO BE IN TRUST TO SELL THE SAME AND IN THE FIRST PLACE TO PAY HIMSELF THE MONEY BY HIM ADVANCED, AND IN NEXT, AND TO PAY THE SURPLUS TO S H, HIS HEIRS, EXECUTORS, OR ADMINISTRATORS. F WAS ADMITTED TENANT TO THE LORD. THEN B, THE FIRST MORTGAGEE, OBTAINED POSSESSION OF THE SAID COPYHOLD ESTATES. S H DIED, LEAVING AN HEIR IN THE PROVINCE OF MARYLAND, HIS HEIR AT LAW, CALLED R H OF BALTIMORE, IN THE PROVINCE OF MARYLAND, HIS HEIR AT LAW, AND A BILL AGAINST B AND R H, CHARGING THE LATTER TO BE ABROAD IN AMERICA,

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and praying an account of what was due to B for principal and interest, and that B might account for the rents and profits, and pay to F what should appear to be due to him after paying such principal and interest; and in case that should not be sufficient to satisfy F's demand, that the estate might be sold, and proper parties join for that purpose, and F be paid out of the purchase-money, and the residue paid and applied as the court should direct. B by his answer acknowledged the possession, and said, that he was ready to account to such person as should appear to be entitled to the equity of redemption; but that he did not know who was so entitled, not knowing what was become of T H, whether he was living or dead, or whether he was ever married, or had left any child or children. One question which arose in the cause was, Whether there were proper parties before the court, the supposed heir at law of T H, the mortgagor, being in America, and his personal representative not being before the court? On the part of F it was insisted that there were sufficient parties; that B had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the first and second mortgagees, it was not necessary to make the mortgagor a party. All the decree was redemption of the first mortgage, and a conveyance to the second, not on account of rents and profits, unless the mortgagee was in possession. That neither the mortgagor nor the first mortgagee were hurt by its being unnecessary to make the mortgagor a party to the bill between them; for the first mortgagee was liable to no further account to the original mortgagor, the second mortgagee being bound only to make him just allowances, and if he should do otherwise, being liable to all charges which might have been made against the first mortgagor in his account with the original mortgagee. *Sed per curiam*,—It is impossible that a second mortgagee should come into this court against the first mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed. It therefore must be necessary to have the real representative before the court, though it is not necessary to have his personal representative.

Fell v. Brown, 2 Bro. R. Chan. 276. ¶See Palk v. Clinton, 12 Ves. 59; Schoole v. Sall, 1 Scho. & Lef. 177.]

¶So also, if a man mortgage an entire estate, which on the death of the mortgagor descends on two different persons, and one of those persons mortgage his share to a second mortgagee, such second mortgagee, in order to redeem, must make not only the first mortgagee and his own immediate mortgagor parties, but also the owner of the other share not included in his mortgage. Lord Oxford made a mortgage of estates in Dorset, Devon, and Cornwall to Sir E. Hughes, which vested in the executors of Lady H. On the death of the mortgagor the Dorsetshire estate became the property of Horatio Walpole, and the estates in Devon and Cornwall of Lord Clinton. Lord Clinton conveyed these estates in Devon and Cornwall to trustees upon trust, to raise money by sale or mortgage, and the trustees mortgaged them to Sir L. Palk for 25,000*l*. Sir L. P. having filed a bill praying an account of what was due on the first mortgage to Lady H's executors, it was objected that Mr. Walpole ought to have been made a party; and the Master of the Rolls decided accordingly, on the ground that the second mortgagee being obliged to redeem the first mortgage *in toto*, not only as it affected the

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estate of Lord C, but also as it affected the estate of Mr. W, he had a right to call on him to attend the account.

*Palk v. Clinton*, 12 Ves. 48; *Woodcock v. Mayne*, cited *Ibid*.

Redemption will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the court will decree in detail that the second shall redeem the first, the third the second, and so on.

*Arcedekne v. Bowes*, 3 Mer. 216, n.¶

Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee as standing in his place will be decreed to convey.

*Hill v. Adams*, 2 Atk. 39.

Where the mortgage is of money in the stocks, or the like, no decree of foreclosure is necessary; therefore, where a bill was brought in 1729 by the plaintiff, to redeem the sum of 2500*l*. East India stock, transferred to the defendant in 1708, for the securing the sum of 2000*l*. and interest; the defendant having executed a defeasance, whereby he obliged himself to transfer the stock on payment of the 2000*l*. and interest, on the 2d of July following the mortgage of it; the Lord Chancellor said, this was a very plain case for the defendant. In a mortgage of land a bill of foreclosure ought to be brought, but on a mortgage of stock it was not necessary, and therefore a strong reason for the mortgagor's departing from the right. And the stock having increased in value, which is a mere accident, will be no inducement to a court of equity to decree a redemption.

*Lockwood v. Ewer*, 2 Atk. 303. But it is observable on the last-mentioned case, that the period of time had elapsed between the mortgage and the bill to redeem, after which, it will be shown hereafter, a court of equity refuses its aid to a mortgagor, unless under special circumstances. 2 Pow. Mortg. 284.

If there be several mortgagees of an entire thing mortgaged, they must all be made parties to the bill of foreclosure. This was held to be necessary in the case of *Lowe v. Morgan*, where a share of Covent Garden theatre having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the registrar, finding some difficulty in drawing up the decree, applied to the Lord Chancellor, who said, it was a new case in respect of their being joint-tenants, and that it would be impossible for one to foreclose without making the other two parties. The cause therefore stood over for that purpose.

*Lowe v. Morgan*, Brown's R. Ch. 368. But if one have received his equitable portion of the debt, the other may sustain a bill by himself. *King v. Harrington*, 2 Aik. 23.¶ {But see 3 Ves. J. 560, *Montgomerie v. Marquis of Bath*.}

¶ And so where two persons lent 12,000*l*. on mortgage, one 2000*l*. and the other 10,000*l*., and the party lending the 2000*l*. filed his bill for foreclosure, the Vice-Chancellor held there could be no foreclosure or redemption, unless the parties entitled to the whole money were before the court.

*Palmer v. Carlisle*, 1 Sim. & Sta. 423.

But where trustees lent on mortgage the money of several *cestuis que trust*, and one of the *cestuis que trust* alone filed a bill of foreclosure against the mortgagor and the trustees, stating that the trustees refused to assist him, no



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objection was made on the ground of the other *cestuis que trust* not being made defendants, and the usual decree was made. In all cases, however, the *trustee* himself must be made a party to a bill of foreclosure by the *cestuis que trust* on account of his having the legal estate.

Montgomerie v. Marquis of Bath, 3 Ves. jun. 560; but see note (1), 1 Bro. Ch. Ca. by Belt, 368; Wood v. Williams, 4 Madd. 186.¶

In a bill to foreclose, the case was:—A made a mortgage for a term of five hundred years, for securing three hundred and fifty pounds and interest to B, who, so long before as 1705, assigned the term to C, redeemable by himself on the payment of 300*l.* B died; C brought a bill against A to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of B, the original mortgagee, parties. *Et per cur.*, Here is plainly a want of proper parties; B had a right to redeem C; and to prevent another account, as to what is due upon the original mortgage, his representatives ought to be before the court.

Hobart v. Abbot, 2 P. Wms. 643.

¶But where a mortgage was made by N to C to secure 1000*l.*, and C assigned the mortgage to M to secure 700*l.*; but no notice of the assignment was given to N; it was held, on a bill filed by N against M to have the mortgage-deeds delivered up, 1st, That C was not a necessary party, as he had been examined as a witness, and had admitted that N had paid him his mortgage-money. 2d, That delivery of goods by C to N was a valid discharge of the mortgage debt, and was a good payment as against M. But 3d, An account was directed as to what part of the mortgage-money was paid, as C's evidence, from his conduct, could not be admitted as sufficient proof.

Norriah v. Marshall, 5 Madd. 475.¶

Courts of equity will never decree a foreclosure until the period limited for payment of the money be passed, and the estate, in consequence thereof, forfeited to the mortgagee; for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

Bonham v. Newcomb, 2 Vent. 365; 1 Vern. 232, S. C. *suprà*. ¶See Stanhope v. Manners, 2 Eden, R. 197.¶

¶A final foreclosure of a mortgage for one of several instalments, cannot extend beyond the instalment due.

Caufman v. Sayre, 2 B. Monr. 207.¶

On a bill for foreclosure, the title of the mortgagee cannot be investigated; but he will be left to pursue legal means to establish it. And, therefore, where a mortgagee sued to have his money, or that the defendant should be barred of his equity of redemption; it happened that, by subsequent orders, possession was directed to be given to the mortgagee, and contempt prosecuted for not delivering it accordingly; upon which, the heir of the mortgagor set forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being insisted, that the course of the court upon such a bill was, and the court could go no farther than to take away the equity of redemption, and leave the mortgagee to such title as he had at law, but could not amend it; which the Lord Chancellor agreed to, and discharged the contempt.

Anonymous, 2 Ch. Ca. 244.

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A mortgagee may bring an ejectment at law, at the same time that he hath a bill of foreclosure depending; for he will not be prevented from pursuing *all* his remedies for the recovery of his debt.

*Bocca v. Booth*, 2 Atk. 344. ¶ A complainant in a foreclosure suit not allowed to prosecute an action on the bond at the same time he is proceeding on the mortgage, merely because a fire has diminished the value of the mortgaged premises. *Engle v. Underwood*, 3 Edw. R. 249. *g*

But special circumstances may arise which will take the case out of the common rule, and induce the court to grant an injunction to stay proceedings upon the ejectment. Thus, where a bill was brought by the plaintiff against the defendant, for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother, and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged to him: the court, because he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem.

*Dud.* [See Powell, 366 a. note (H), 6th ed.]

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the court may refuse such decree. Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him to protect his encumbrance; the court, on a bill filed by him to foreclose the children claiming under the settlement, refused to do so, saying, that if he might be suffered to protect himself by getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

*Summers v. Deben*, 2 Vern. 271.

[Where the bill of foreclosure admitted that the plaintiff could not produce the deeds alleging that they had been stolen from the mortgagee; the court directed the account, with an inquiry what had become of the deeds, and the master afterwards reporting that the deeds were not to be found, a recompence was directed, with an indemnity and costs against the plaintiff.]

*Stowe v. Kisson*, 3 Ves. & R. 51; 19 Ves. 285; *Smith v. Bicknell*, *Ibid.* *nota* (b).]

A mortgagee of a copyhold estate, who is not in possession, may exhibit his bill against a mortgagee, before admittance, for a decree of foreclosure; and, after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged premises.

*Stowe v. Stowe*, 2 Atk. 333.

When a mortgagee is made party to a bill, praying relief || by the mortgagor, he is to be taken notice of as praying to redeem, for redemption is the object of the bill, and it is then a reference to a master to see what is due for principal, interest, and costs; and when the plaintiff does not redeem the mortgagee, he may move the court to dismiss the bill, as against him, which is the usual practice in a foreclosure.

*Chambers v. Chambers* (Mortgage of Church), 2 Atk. 267; [Bishop of Winchester v. *Mortimer*, 10 Ves. 104.]

[The mortgagor, the mortgagee and his heirs, but a purchaser of the equity of redemption, cannot take, will be bound by it.

*Stowe v. Stowe*, 2 Atk. 333.

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And the court will not enlarge the time for payment, on a bill for redemption, as is done on a bill of foreclosure. In a case where a motion for that purpose was made, the Lord Chancellor said that the difference in principle between this case and that of a bill to foreclose was obvious, and that he would not begin such a practice.

*Novosielski v. Wakefield*, 17 Ves. 417.

But if a bill to redeem is dismissed for want of prosecution, and not for want of payment, the mortgagor may file a second bill to redeem.

*Hansard v. Hardy*, 18 Ves. 460.¶

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or to be decreed to make farther assurance, and be foreclosed of redemption; it is a good cause of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party.

*Freak v. Hearsey*, 1 Ch. Ca. 51; [S. C. 2 Freem. 180; *Nelson, R.* 93.] ¶ The heirs of a deceased mortgagee cannot sustain a bill to foreclose; it must be brought in the name of the executor or administrator. *Roath v. Smith*, 5 Conn. 133. See *Harrison v. Harrison*, 1 Call, 419. §

And, since it has been determined that, in all mortgages, the money belongs to the executor or administrator, and not to the heir; if it comes out, upon the hearing, that the executor or administrator are not parties, the plaintiff in the cause cannot be permitted to proceed.

*Meeker v. Tanton*, 2 Ch. Ca. 29.

The executor of the mortgagor need not be party; for where, on a bill brought by a mortgagee against the mortgagor to foreclose, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Master of the Rolls and the Registrar, that there was no necessity to make him party; because, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, viz. the heir; (a) and the course was so; neither was the mortgagee any ways bound to intermeddle with the personal estate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it.

*Duncomb v. Hansley*, 3 P. Wms. 333, in notes. [In *Bradshaw v. Outram*, 13 Ves. 234, the bill was dismissed as against the executrix of mortgagor, and, by *consent*, without costs. In a bill for a sale, however, after the death of the mortgagor, the personal representative should be a party, because the personal estate must be first applied. *Daniel v. Skipwith*, 2 Bro. C. Ca. 155; and see *per* Sir T. Plumer, in *Cholmondeley v. Clinton*, 2 Jac. & Walk. 135, and *Christopher v. Sparke*, 2 Jac. & Walk. 229. (a) The heir is not a necessary party if the equity of redemption has passed to a devisee. *Powel*, 968, note; and see *Cholmondeley v. Clinton*, 2 Jac. & Walk. 135.]

{If the land mortgaged is devised by the mortgagor, the bill to foreclose must be against the devisees, and not the executors of the mortgagor.

2 Hen. & Mun. 6, *Graham's Exrs. v. Carter*.}

But a foreclosure, obtained on a bill exhibited by the heir at law, will be binding, although the executor or administrator be not a party; for if the executor or administrator of the mortgagee should afterwards come against the heir of the mortgagee, to have the benefit of the mortgage, the heir, in case the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himself.

*Clarkson v. Bowyer et al.*, 2 Vern. 66.

Where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party; upon a bill by the executor, against

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the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor.

*Globe et ux. v. Earl of Carlisle*, cited in the last case. But it is observable that, in this case, the heir made no offer to pay the mortgage-money to the executor, which is the basis of the resolution in the former case.

§ A mortgagee who has assigned the mortgage as a security or pledge of a loan of less amount than the mortgage, may, especially when the pledgee refuses to proceed, file a bill of foreclosure in his own name.

*Norton v. Warner*, 3 Edw. 106.

An encumbrancer *pendente lite* need not be made a party to a bill of foreclosure, unless under special circumstances.

*Cook v. Mancius*, 5 Johns. Ch. 89.

One of two mortgagees, in a mortgage given as a security for a joint debt, having assigned all his interests in the mortgaged premises, and the other having been paid his equitable portion of the debt, the assignee can sustain a bill by himself, in his own name, to foreclose the equity of redemption.

*King v. Harrington*, 2 Aik. 33.

If a mortgagor convey the mortgaged estate to several persons, they should all be made parties to the bill of foreclosure, and compelled to contribute proportionably to the extinguishment of the mortgagee's debt, according to the interest which each holds in the estate; and if the mortgagor retain a part of the estate, that should be the first subjected.

*Poston v. Eubank*, 3 J. J. Marsh. 44.

A mortgagee who has conveyed the whole mortgaged premises with warranty in fee, may yet foreclose; for this conveyance of the land will not pass his interest in the mortgage.

*Wilson v. Troup*, 2 Cowen, 195.

An assignment of the mortgaged debt, without conveyance of the legal title of the mortgaged premises, is sufficient to entitle the assignee to sustain a petition for foreclosure.

*Austin v. Burbank*, 2 Day, 474.

A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party.

*Rose v. Page*, 2 Sim. 471.

The assignee of a mortgage may file a bill against the mortgagor without joining the mortgagee, he having parted with all his interest by an absolute assignment.

*Whitney v. McKinley*, 7 Johns. Ch. R. 144; *Newman v. Chapman*, 2 Rand. 93

On a bill of foreclosure, it is not necessary to make any encumbrancer, whose equity of redemption has been foreclosed, a party.

*Brown v. Beers*, 6 Conn. 198. *g*

¶ If a mortgagor become bankrupt, he will not be a necessary party to a bill for foreclosure by the mortgagee. Where the mortgagor executed a composition-deed, and was afterwards declared bankrupt, a collusive foreclosure against the assignees only, without the trustees of the deed, was set aside, and mortgagee (*a*) charged with costs.

*Adams v. Holbrooke*, Harr. C. P. 30; and see *Bainbridge v. Pinhorn*, 1 Buck. Ca. 135; *Lloyd v. Lander*, 5 Madd. 288. (*a*) *Harvey v. Tehbutt*, 1 Jac. & Walk. 197; ¶ *Benedict v. Gilman*, 4 Paige, 58; *Broom v. Beers*, 6 Conn. 198. *g*

A plea of a decree for foreclosure in the common form, with an averment

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of non-payment of the money, &c., *but no final order for foreclosure*, on appeal from Lord King, was held not to be good; (a) for, although such plea, and length of time, might be a good defence, yet, as a plea, it could not stand for want of a final order.

*Senhouse v. Earl*, 2 Ves. 450. ||(a) The estate does not lose the quality of a pledge until the final order of foreclosure. *Thompson v. Grant*, 4 Madd. 438.||

On a decree to foreclose at a period certain, the computation of time must be according to calendar months, and not according to lunar ones.

*Anonymous*, Barnard. 324; 2 Eq. Ca. Abr. 605, p. 38, S. C.

Although where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure, yet, if there be an express estate for life, the remainder-man ought to be a party.

*Sutton v. Stone*, 2 Atk. 101; ||and see *Gore v. Stacpoole*, 1 Dow. P. R. 31.|| β A mortgagor who has conveyed to another his equity of redemption, having no longer an interest in the subject, ought not to be made a party to a bill of foreclosure. *Swift v. Edson*, 5 Conn. 531.g

||But where the tenant in tail was abroad, and out of the jurisdiction of the court, a decree of foreclosure was obtained against the parties before the court.

*Fishwick v. Lowe*, 1 Cox, 411.|| β See *Gowan v. Tyghe*, 3 Moll. 113.g

β Where some of several defendants in a suit for foreclosure disclaim, the court will not simply dismiss the bill as to them, but decree them to be foreclosed.

*Perkin v. Stafford*, 10 Sim. 562.g

If there be many encumbrancers, some of whom are not made parties to a bill to foreclose, the plaintiff in the bill may notwithstanding foreclose such defendants as he has brought before the court.

*Draper et al. v. Jennings et al.*, 2 Vern. 518. {See 3 Ves. J. 314, *Bishop of Winchester v. Beavor*; 11 Ves. J., 194, *Bishop of Winchester v. Paine*.}

But those not parties to the suit will not be bound by such decree.

*Sherman v. Cox*, 3 Rep. Ch. 84; S. C. *Nelson's R.* 71; ||2 Freem. 14.||

{If subsequent mortgages are given during the pendency of a bill to foreclose a prior mortgage, the subsequent mortgagees are bound by the decree of foreclosure, though not made parties. And it is not necessary to make them parties, though the suit be afterwards abated by the death of the mortgagor, and revived by the mortgagee.

11 Ves. J., 194, *Bishop of Winchester v. Paine*.}

If there be tenant for life, reversion in fee, and he in reversion mortgage his estate in fee, and the mortgagee devise it, the devisee may bring his bill to foreclose against the mortgagor, and need not make the heir of the devisor a party; because he hath no interest in the land, it being all devised away from him; and therefore the devisee need only foreclose the mortgagor.

*How v. Viguers*, 1 Ch. R. 33; 1 Eq. Ca. Abr. 318, 5.

{Whether after a foreclosure, and sale of the mortgaged estate, which is found insufficient to discharge the debt, the mortgagee may sue upon the bond, or upon a covenant in the mortgage, to recover the deficiency; *quære*.

See 2 Bro. C. C. 125, *Tooke v. Hartley*; 2 Dick. 785, S. C.; *Ibid.* 551, *Aylet v. Hill*; 8 Ves. J., 527, *Perry v. Barker*; 3 Mass. T. Rep. 562, *Amory v. Fairbanks*.}

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[And if the devisee make the heir a party, he will not be allowed the costs out of the estate.

*Shipp v. Wyatt*, 1 Cox, 353.

In giving the mortgagee relief by foreclosure, the court has been liberal in granting extension of the time of payment to the mortgagor, even after a decree of foreclosure signed and enrolled. In a late case the time was enlarged on the application of the mortgagor, under special circumstances, by four several orders. And although the proceedings be under the 7 G. 2, c. 20, § 2, the court has equally jurisdiction to enlarge the time.

*Edwards v. Cunliffe*, 1 Madd. 287; *Wakerell v. Delight*, 9 Ves. 36.  $\beta$  In a foreclosure suit, an order to enlarge the time for the payment of the mortgage-money is by no means of course, but may be refused, when no excuse for the default is stated, and the security does not appear to be ample. *Eyre v. Hanson*, 2 Beav. 478. See *Jones v. Creswick*, 9 Sim. 364.

Even in cases where the decree has been signed and enrolled, and the mortgagee has been in possession many years, the court will, under special circumstances, open the foreclosure, and permit the mortgagor to redeem.

*Burgh v. Langton*, 15 Vin. 476; 2 Eq. Ca. Ab. 609; 5 Bro. P. C. 213. Vide 1 Ch. Ca. 61. 62.

Where the decree of foreclosure has been obtained fraudulently and unfairly by the mortgagee, and without bringing proper parties before the court, the foreclosure will be opened; and in a late case of this kind the mortgagee was ordered to pay the costs occasioned by his resistance of the redemption, on the ground of a decree so improperly obtained. Where sales of the mortgaged estate had taken place under a decree of foreclosure, collusively obtained in 1733, by making only the tenant for life party, without any of the remainder-men; and the Chancellor of Ireland had dismissed a bill for redemption, filed by a remainder-man in tail, in 1796, on the ground of the lapse of time, the House of Lords, in 1813, reversed the decree of dismissal, and decided that the remainder-man was entitled to redeem, at least that part of the estates which had been sold to a party cognisant of the fraud.

*Harvey v. Tubbet*, 1 Jac. & W. 197; *Gore v. Staupoole*, 1 Dow. P. R. 18.

If after foreclosure the mortgagee proceed against the mortgagor on his bond or other collateral security, as he may do at law, a court of equity will open the foreclosure.

*Dunwood v. Blithway*, 1 Eq. Ca. Abr. 317; 15 Vin. Abr. 476; *Tooke v. Harley*, 2 Bro. P. C. 126.

Whether equity will grant an injunction against the proceedings at law if the mortgagee has sold the estate, and deprived himself of the means of having the mortgagee redeem, is not a settled point. In *Perry v. Barker* the Lord Chancellor said, if there was any probability that the mortgagee could get the estate back again, he ought to have a limited time for that purpose; then he ought to tender a conveyance, and the mortgagor should have a given time to redeem; but the mortgagee's demand in that case was so incommensurable that his lordship decreed a perpetual injunction against proceeding at law.

*Perry v. Barker*, 2 Ves. 507; 13 Ves. 193.

Equity will not open a decree of foreclosure by reason of the overvalue of the estate, and a paid agreement to permit a redemption; and after twenty years' possession the court will not set aside the foreclosure for mere

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form; nor will a bill of revivor and supplement be a waiver of the decree; nor will the mere fact of the mortgagee devising the estate as money, or noticing it for a collateral purpose, as a debt, open the foreclosure. And if there have been considerable alterations made in the estate, accompanied with length of possession, the decree will not be opened.

*Wishal v. Short*, 3 Bro. P. C. 558; *Jones v. Kenrick*, 5 Bro. P. C. 244; *Birch's ca.* *Gilb. Rep. in Eq.* 186; *Silberschidt v. Schiott*, 3 Ves. & B. 45; *Tooke v. Bishop of Ely*, 5 Bro. P. C. 181; *Lant v. Crisp*, *Ibid.* 200. Vide *Coote on Mortg.* 516.]

§ All mortgages may be foreclosed in equity; whether the mortgage be to secure the payment of a sum of money, or the performance of a covenant, the rule is the same.

*Rodgers v. Jones*, 1 M'Cord's Ch. 321.

Proceedings to foreclose a mortgage are *in rem*, to reach the pledge, and equity has nothing else to do. Upon the property proving insufficient, it cannot decree that the defendant shall pay the balance and give an execution for such balance.

*Downing v. Palmateer*, 1 Monr. 66. See *Dunkley v. Van Buren*, 3 Johns. Ch. 330.

A bill may be filed to foreclose a mortgage after the commencement of a suit at law on the bond, before any judgment therein, without a previous discontinuance of the suit. But after filing the bill of foreclosure, no further proceeding can be had in the suit at law without the special order of the Court of Chancery allowing the plaintiff to proceed in such suit.

*Williamson v. Champlain*, 9 Paige, 70; S. C. 1 Clark, 1. See *Andrews v. Sutton*, 2 Bland, 629.

When the mortgage debt is payable by instalments, the mortgage may be foreclosed before the last instalment becomes due.

*Salmon v. Claggett*, 3 Bland, 126; *Caufman v. Sayre*, 2 B. Monr. 204.

A mortgaged to B an oat-mill and certain lands. He afterwards erected additional mills and machinery, and mortgaged the equity of redemption to C, to whom he gave a bond collateral: held, that after a bill of foreclosure filed by B, to which C was made a party defendant, C could not, under an execution sued out on his bond, seize the movable machinery erected after the date of B's mortgage.

*M'Cluney v. Lemon*, *Haye's Exch.* 154.g

||(As to foreclosure against infants, vide tit. "INFANCY AND AGE," (K.)||

(F) Mortgagees and their Assignees, how to account, and what Allowances to make:  
 || And herein of Interest. ||

THE mortgagee is answerable in equity, when he comes into the possession of lands for the profits he has made of the lands, and not for the profits which he might have made, unless there be fraud; for it is the fault and laches of the mortgagor, that he would let the lands lapse into the hands of the mortgagee, by the non-payment of the money, and when they do, he is only a bailiff for what he actually receives, but is not bound to the trouble and pains of making the best of what is another's.

*Chan. Ca.* 258; *Vern.* 476, 45; {12 Ves. J. 493, *Hughes v. Williams*. And if he does engage in speculations in which he is not bound to engage, he speculates at his own hazard, *Ibid.*} ||1 Eq. Ca. Abr. 328;|| § *Woodward v. Fitzpatrick*, 2 B. Monr. 61; *Hagthorp v. Hook*, 1 Gill & Johns. 273; *Fenwick v. Macy*, 1 Dana, 286; *Bainbridge v. Owen*, 2 J. J. Marsh. 465; *Reed v. Landsdale*, *Hard.* 7; *Field v. Beeler*, 3 Bibb, 18; *Wilkins v. Sears*, 4 Monr. 348; *Rawlings v. Stewart*, 1 Bland, 22; *Moore v. Cable*,

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1 Johns. Ch. 385; Whittick v. Kane, 1 Paige, 202; Robertson v. Campbell, 2 Call, 421; Clark v. Robbins, 6 Dana, 350; Price v. Smith, 1 Green's Ch. 516; Wilson v. Cluer, 3 Beav. 136; Bruere v. Wharton, 7 Sim. 483; Quin v. Brittain, 1 Hoff. 353.

§ When a mortgagee takes actual possession of the mortgaged premises, he makes himself tenant of the land, and subjects himself to the highest fair rent.

Morrison v. M'Leod, 2 Iredell, 108.

And therefore a mortgagee shall not be bound by any proof that the land was worth so much, unless it can likewise be proved that he did actually make so much of it, or might have done so had it not been for his wilful default; as, if he turned out a sufficient tenant that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

Vern. 45; {12 Ves. J., 494; } [Hughes v. Williams, 12 Ves. 493.]

[If the mortgagor make proof that the estate was let at *such* a price, whilst in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee show the contrary, which it is in his power to do, as being let by him.

Blacklock v. Barnet, Sel. Ca. Ch. 53. [See Trimleston v. Hamil, 1 Ball. & B. 385.]

{If one demise an estate for a term of years, reserving rent, and afterwards mortgage the same estate to the lessee in fee, and the mortgagee refuses to pay the rent, the rent is suspended until the condition be performed, or the estate redeemed: during the suspension, the lessee will be accountable for the profits, as mortgagee, toward the discharge of the interest and principal of the debt; but if he voluntarily pay the rent, he shall not afterwards be accountable as mortgagee for the profits for the same time.

3 Mass. T. Rep. 138, Newall v. Wright.

Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care and pains; but, if they employ a skilful bailiff, they will be allowed such sums as they have paid him; for a man is not bound to be his own bailiff.

Bonithon v. Hockmore, 1 Vern. 316; 3 Atk. 518; [Davis v. Dendy, 3 Madd. 170.]  
§ When the payment of taxes upon the mortgaged premises is necessary to protect the estate, and the mortgagee pays them, the amount is chargeable upon it. Mix v. Hotchkiss, 14 Day, 32.

And though there be a private agreement between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and interest.

French v. Baron, 2 Atk. 120; {5 Ves. J., 834, Chambers v. Goldwin; 9 Ves. J., 254, S. C.}

§ A mortgagee of a slave, who appears to have acted in good faith in hiring him out, and to have rendered a true account of the hire, is held to be chargeable with no more, though it appears that the slave might have been hired for a good deal more.

Clark v. Robbins, 6 Dana, 350. See Woodward v. Fitzpatrick, 2 B. Monr. 61.

[The mortgagee may stipulate with the mortgagor for the appointment of a receiver to be paid by the latter, although the mortgagee himself is clearly not entitled to charge for his personal trouble.

Chambers v. Goldwin, 9 Ves. 271.]



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But if the mortgagee *having the legal estate* neglect to make such stipulation, he cannot obtain the appointment of a receiver, by order of the court, but must proceed to eject the mortgagor; and if the first mortgagee be in possession, the court will not, in general, on application of a subsequent mortgagee, appoint a receiver; but the second mortgagee must redeem the first. But if the first mortgagee be not in possession, a second mortgagee may have a receiver without prejudice to the rights of the first.

Berney v. Sewell, 1 Jac. & W. 647; Codrington v. Parker, 16 Ves. 469; Quarrell v. Beckford, 13 Ves. 377; Bryan v. Cormick, 1 Cox, 422; Dalmer v. Dashwood, 2 Cox, 378; Price v. Williams, Cooper, C. C. 31.

When a receiver has been appointed by the court, it is a contempt in the first mortgagee to proceed by ejectment without the consent of the court; and upon his application for such purpose, the court has been either to permit him to bring ejectment, or to be examined *pro interesse suo*.

Brooks v. Greathed, 1 Jac. & W. 178; Angell v. Smith, 9 Ves. 335; as to examination *pro interesse suo*, and as to receivers, vide Coote on Mortg. 597, and cases there cited.

When a mortgagee is in possession without notice from the second mortgagee, he may pay the surplus over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, cannot have an account of the by-gone rents, for he could not have such an account against the mortgagor, and therefore not against the first mortgagee.

Berney v. Sewell, 1 Jac. & W. 650.

But after notice by subsequent mortgagees, the first mortgagee in possession has no right to pay over the surplus proceeds to the mortgagor. Nor, after a bill filed by a second encumbrancer against the first encumbrancer, can the latter safely pay the surplus rents to a general creditor who has filed a bill for the establishment of his lien.

Parker v. Calcraft, 6 Madd. 11; Archdeacon v. Bowes, 13 Price, 368.]

A mortgagee in possession is not obliged to lay out money *any farther* than to keep the estate in necessary repair; but, if a mortgagee hath expended any sum of money in supporting the right of the mortgagor to the estate, where his title hath been impeached, ||or in renewal, fines, necessary repairs, and lasting improvements; or in performing covenants of the mortgagor with third persons; or in copyhold admissions, heriots, or fines;|| the mortgagee may certainly add this to the principal of his debt, and it will carry interest.

Godfrey v. Watson, 3 Atk. 518;] ||Lomax v. Hide, 2 Vern. 185; Manlove v. Ball, Ibid. 81; 2 Bro. C. C. 653; Lacon v. Martins, 3 Atk. 4; Lyster v. Dolland, 1 Ves. jun., 436; Hardy v. Reeves, 4 Ibid. 482; Quarrell v. Beckford, 1 Madd. 281; *Ex parte* Sykes, 1 Buck. 349; *Ex parte* Brightwen, 1 Swanst. 3; Swan v. Swan, 8 Price, 518.]

||A mortgagee will not be bound to keep up buildings in as good repair as he found them, if the length of time will account for their being dilapidated.

Russell v. Smithers, 1 Anstr. 96.

§ A mortgagee will be allowed for his expenses in keeping the mortgaged premises in repair, and not for any improvements upon them; (a) but such repairs must be beneficial to the estate. (b) When such repairs are allowed by the master, they will be presumed to have been necessary.

(a) Russell v. Blake, 2 Pick. 505. (b) Reed v. Reed, 10 Pick. 398. (c) 10 Pick. 398.

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Generally a mortgagee in possession is not allowed for new improvements erected upon the premises ; but this rule is not without exception.

*Dougherty v. M'Colgan*, 6 Gill & Johns. 275 ; *Murphey v. Meade*, 1 Jones, Exch. R. 620. See *Quin v. Brittain*, 1 Hoff. R. 353.*g*

And a mortgagee in possession of mines is not bound to spend more in working them than a prudent owner would do.

*Rowe v. Wood*, 2 Jac. & W. 553 ; and see *Marshall v. Cave*, Powell, 957 a, (6th ed.)]

If a mortgagee in possession assigns over his mortgage without assent of the mortgagor to an insolvent person, the mortgagee is bound to answer the profits both before and after the assignment, though assigned only for his own debt ; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent. But *quære*, if the mortgagor hides, so that he cannot be served with a *subpoena* to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment ?

3 Chan. Ca. 3 ; 1 Eq. Ca. Abr. 328.

If the mortgagee assigns his mortgage, and the mortgagor comes to redeem against the assignee, all moneys really paid by the assignee, either as principal or interest, shall be principal to the assignee, and shall bear interest ; otherwise it is, if the assignee had not paid the money, and the assignment was only colourable, in order to load the mortgagor with compound interest.

Chan. Ca. 67, 258 ; Vern. 169 ; 2 Vern. 135.

If a stranger get an assignment of a mortgage for less than is due, the mortgagor, or his heir, shall not redeem without paying all the money due ; but if a man purchases the mortgaged lands without notice of this encumbrance, whether he has not an equity to redeem them for what was really paid by the stranger, is made a *quære* ?

Vern. 336.

But if there are subsequent encumbrances, or creditors in the case, a man who buys in a prior encumbrance shall, against them, be allowed only what he really paid, though there was in truth a greater sum due.

Vern. 476.

If an infant, by his guardian, endeavours to overthrow the mortgage by a supposed entail, and after a special verdict, and great agitation at law, the mortgagee prevails, and the infant brings his bill to redeem ; the mortgagee having sworn he paid and expended above 120*l*. in defending his mortgage at law, although he had but 60*l*. costs allowed him there, shall not be held down to the taxation at law, but shall on the account be allowed all he laid out or expended ; and if the mortgagee in this case, fearing that his mortgage would be defeated at law, gets administration, as principal creditor, in the spiritual court, he shall be allowed the costs expended there also.

9 Vern. 526, *Ramsden v. Langley*. [See cases cited *ante*, 165, as to allowance of repairs, fines, and costs of defending title.]

The mortgagee obtained judgment in ejectment, and entered on the mortgaged premises, and thereby prevented other creditors that had subsequent encumbrances from entering, and yet permitted the mortgagor to take the profits ; and the other encumbrancers coming to redeem him, the court ordered, that the mortgagee should be charged with all the profits he had, or might have, received since his entry.

*Coppering v. Cooke*, Vern. 270.

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So, where a bankrupt, before he became such, had made a mortgage of his estate, and the assignees of the statute brought an ejectment for recovery of the lands comprised in the mortgage, and the mortgagee refused to enter, but suffered the bankrupt to take the profits, and to fence against the assignees with the mortgage; it was held, that the mortgagee should be charged with the profits from the time of ejectment delivered.

Buckingham v. Gayer, Vern. 258, 267; ||Penrhyn v. Hughes, 5 Ves. 106.]

{If it be agreed between a mortgagor and mortgagee, that in case the debt be not paid, the mortgagee may sell the property, and in consequence thereof he sells, (without proof of fraud,) he is accountable to the mortgagor for the surplus of the price above the amount of the debt, with interest on such surplus till payment; but not for profits, unless he appears to have received them previous to the sale; nor for the value of the property at any subsequent time.

1 Hen. & Mun. 29, Moore's Exr. v. Aylett's Exr.}

A mortgaged the manor of T to B, to which an advowson was appendant; B brought a bill to foreclose; the church became void, and likewise brought a *quare impedit* at law; and on a motion to stay the proceedings on the *quare impedit*, the court held, that though A had no bill, yet being ready, and offering to pay the principal, interests, and costs; if B would not accept his money, interest should cease, and an injunction to stay proceedings on the *quare impedit* should be granted; for the mortgagee can make no benefit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee therefore, in that case, is but in the nature of a trustee for the mortgagor.

Amhurst v. Dawling, 2 Vern. 401; ||Ivry v. Cox, Prec. Cha. 71.] See Gubbins v. Creed, 2 Scho. & Lef. 218.

It was decreed that a mortgagee having received *8l. per cent.* since the year 1660, when the interest was reduced by statute to *6l. per cent.*, should account for the *2l. per cent.* over value to sink the principal mortgage-money. But if the principal and interest were overpaid, the parties must shake hands, for there shall be no refunding.

Prec. Ch. 50, Walker v. Penrin. [This cause was first brought to a hearing before Lord Chancellor Nottingham, on the mortgagee's bill to foreclose, and he being of opinion, that the two *per cent.* should go towards sinking the principal, the then plaintiff dismissed his bill. Afterwards the mortgagor brought his bill to redeem, and that coming to a hearing before the Lord Chancellor Jeffries, he was of opinion, that the eight *per cent.* being paid, and received as interest, no part of it ought to be applied to sink the principal; and that the statute had no retrospect beyond 1660, but looked forward to contracts and agreements then after to be made, and not to any contracts or agreements before that time, and decreed the account to be taken accordingly. 2 Vern. 78. But upon a bill of review, Rawlinson and Hutchins, Lords Commissioners, held, that the decree should be reversed, against Lord Trevor. 2 Vern. 145. It seems, however, to be now settled, that the statute of 12 Ann. c. 16, which reduces the interest of money to *5l. per cent.*, has not a retrospect to any debts contracted before, but that they shall carry interest according to the interest allowed, or agreement made at the time when the debt was contracted. 1 Eq. Ca. Abr. 288.]

A makes a jointure of an equity of redemption, and afterwards becomes a bankrupt, the commissioners assign this equity of redemption, and the assignees state an account. The jointress brings her bill to be relieved, alleging combination between the assignees and the mortgagee, and that they had allowed more money than was due on the mortgage. Lord Keeper,—The assignees stand in the place of the husband, and the account stated by



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in the stating of this account, but the plaintiff ought to have assigned particular errors in the account.

*Knight v. Bamfield et al.*, 1 Vern. 179; [*Drew v. Power*, 1 Scho. & Lef. 192.]

¶ If an attorney take a mortgage from his client for his bill of costs, the account being unsettled, a bill for a general account will at any time lie against him; and although it is a rule that an account shall not be opened unless specific errors are pointed out, yet if the bill allege error generally, and the attorney admit the fact, the account will be opened.

*Detillin v. Gale*, 7 Ves. 583; *Mathews v. Wallwyn*, 4 Ves. 118.

And if a solicitor, having taken a mortgage from his client, charges poundage for receiving the rents in his account, without informing the client that legally he has no right to do so, the mortgagor will be allowed to surcharge and falsify, notwithstanding his acquiescence in the charge; for it was the solicitor's duty to inform his client of the rule of the court.

*Langstaffe v. Fenwicke*, 10 Ves. 405; and as to mortgages from clients to their attorneys, see *Newman v. Payne*, 4 Bro. C. C. 350; *Cane v. Allen*, 2 Dow. R. 289; *Pitcher v. Rigby*, 9 Price, 79; *Lewis v. Morgan*, 3 Anst. 769; 5 Price, 42; 4 Dow. R. 29; *Dalby v. Kelly*, 4 Dow. R. 417.¶

Where, upon the assignment of a mortgage, the debt was stated between the assignee, the mortgagee, and some of the coheirs that were looked upon to have a right to the redemption: it was insisted, that this ought to conclude the plaintiff, who claimed as devisee under the will of the mortgagor, as a stated account: but he being no party thereto, that was overruled by the court.

*Earl of Macclesfield v. Fitton*, 1 Vern. 168, *infra*, 173; [and see *Chambers v. Goldwin*, 9 Ves. 264.]

An assignee, after several assignments, will not be obliged to account for profits before his own time. Thus where, on a bill to redeem a mortgage made in 1632, it was insisted by the defendant, that he came in as an assignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper said, that as there had been no stint put to the time at which a mortgage was to be redeemed, the defendant should account; but, in regard he came in at an old hand, it should not be taken; but so far only as went in discount of his money, *not* for the surplusage.

*Pearsan v. Pulley*, 1 Chan. Ca. 102; [see *vide per Lord Eldon*, 9 Ves. 269.]

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was dismissed in 1641; afterwards, he who had the extent, by virtue of the dismission, sold the premises to the defendant, and the plaintiff having since bought the equity of redemption came to redeem; the court, notwithstanding the dismission, and length of time, ordered an account from the purchase, not from any time before, but till then, the profits to go against the interest.

*Cloberry v. Symonds*, 2 Ch. Rep. 392; [see *vide contra Chambers v. Goldwin*, 9 Ves. 268, 269.]

An account taken by a master upon a decree in a bill of revivor, brought by an infant heir, will bind the heir, unless he can surcharge or falsify.

*Badham v. Odell*, 4 Brown's Parl. Ca. 447, S. C. *infra*.

Where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the principal. But as this is often

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attended with great hardships to mortgagees, (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to an account,) the master is not obliged, on every small excess of interest, to apply it to sink the principal; nor has the court ever laid it down as an invariable rule, that the master must always, in taking such accounts, make annual rests.

*Gould v. Tancred*, 2 Atk. 534.

||The master must not take annual rests unless specifically directed by the court; and it appears not to be the general practice to direct rests unless under special circumstances, as where no interest was in arrear when the mortgagee entered into possession; and rests are never directed for part of the time, but must be for the whole or none.

*Webber v. Hunt*, 1 Madd. 13; and cases there cited. *Shepherd v. Elliott*, 4 Madd. 254; *Davis v. May*, *Cooper*, C. C. 240, and cases there cited; and see *Raphael v. Boehm*, 11 Ves. 92; *Stokoe v. Robson*, 19 Ves. 385.

If the mortgagee was paid in full at the time of filing the bill, he will be charged with interest on the balance in his hands.

*Quarrel v. Beckford*, 1 Madd. 269.||

It is the constant practice of the Court of Chancery, in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it had not been for their own default; and yet if the person decreed to account receive any thing subsequent to the decree, it is inquirable before the master, and the defendants in such case must bring such sums so received to account.

*Balstrode v. Bradley*, 3 Atk. 582.

||In directing a second account on the same mortgage, the court will order it to be taken from the foot of the preceding account, or from the date of the report, as the case may happen.

*Proctor v. Cooper*, 2 Vern. 377; *Badham v. Odell*, 4 Bro. P. C. 584, (8vo edit.)

A mortgagee who has been appointed an executor to the mortgagor renouncing the executorship, and then settling his accounts with the other executors, will be subject at any time to have those accounts opened by the parties entitled to the equity of redemption.

See Lord Eldon's remarks, 9 Ves. 274.

In a case where the title-deeds had been stolen from a mortgagee, the account was directed with an inquiry what had become of them.

*Stokoe v. Robson*, 3 Ves. & B. 51; S. C. 19 Ves. 385; and see *Shelmerdine v. Harrop*, 6 Madd. 39.

A mortgagee may take advantage of a recital in the deed of assignment to show what the mortgagee and assignee considered due, which will be binding on the parties in the deed, according to Lord Redesdale.

*Carew v. Johnstone*, 2 Scho. & Lef. 295; and see *Druce v. Dennison*, 6 Ves. 885.||

*Thomas Odell*, an infant, to whom the equity of redemption of a mortgage for years descended on the death of his father, (who had exhibited his bill in the Court of Exchequer in Ireland, against the mortgagee and his assignee, to redeem the premises, and for an account of the money due on the mortgage,) filed his bill of revivor; the cause was heard, and the court decreed, that it should be referred to the Remembrancer to state and settle an account; who made his report, that 1883*l.* 18*s.* was due for principal

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*and interest*, which, there being no objections made, or exceptions taken thereto, was absolutely confirmed. And the cause coming on for further hearing, it was decreed, that upon the mortgagor's paying the sum of 1883l. 18s. so reported due, *with interest for the same*, from the time of the report being confirmed *absolute*, the premises should be reconveyed, and all bonds and securities delivered up. Afterwards, Odell neglecting to pay the money reported due, or any interest for the same, the mortgagee, who had likewise had a suit depending, filed an amendment and supplemental bill, in order to have the benefit of the decree by a sale or absolute foreclosure; and therein, in regard the account of what was due on the said mortgage had been stated in the former cause, prayed to have the benefit thereof, and that the account should be taken, in his present suit, on the foot of the report or decree made in the former suit. To this bill Odell put in his answer, and thereby, amongst other things, admitted the former report, decree, and proceedings; but insisted that, apprehending he was much aggrieved by those proceedings, he chose to have his bill, upon which the said decrees were made, dismissed, rather than submit thereto. Afterwards, the cause came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the said former cause; but that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the Chief Remembrancer, or his deputy, to audit, and state an account between the plaintiff and defendant on the foot of the mortgages and securities in the pleadings mentioned, in which account both parties were to have all just allowances. From this decree the mortgagee appealed, insisting, that the infant ought to be concluded by the account taken in the former cause, on a bill originally brought by his father, revived, and carried on by himself, confirmed by subsequent orders of the court, and signed and enrolled; and that he ought not to be permitted to waive or vary the same, especially when neither fraud nor error in the account were even suggested. And so it was adjudged, as to that point, and the decree reversed; and it was further ordered, that the account taken upon the former decree should stand, with liberty for the infant to surcharge, or falsify the same; and that, in case of any surcharge, or falsification, the Remembrancer should deduct so much as ought to be deducted on account thereof: and that the Remembrancer should carry on the account of the *subsequent interest, from the time of the confirmation of the former report*, for the sum thereby reported due, after such deductions made thereout as aforesaid.

Badham v. Odell an infant, and Fitzmaurice his guardian, 4 Brown's Parl. Ca. 447.]

J S mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate; and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself, who was then near of age, signed it; and the account being admitted to be fair, it was held by my Lord Chancellor, that though regularly interest shall not carry interest, yet that in some cases, and upon some circumstances, it would be injustice if interest should not be made principal; and the rather in this case, because

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it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence.

Abr. Eq. 287, *Earl of Chesterfield v. Lady Cromwell*. [On a bill that an infant might redeem a mortgage, or be foreclosed; it was decreed upon the hearing, to an account, and that the infant should pay what was reported due, unless he showed cause to the contrary six months after he came of age. A report was made, and confirmed, of 2600*l.* due; and upon a subsequent order being made to compute interest, the Lord Keeper doubted whether interest ought to be allowed for the interest. *Bennett v. Edwards*, 2 Vern. 392.]

[In general, interest shall not carry interest upon a mortgagor's signing an account, whereby he admits so much due for interest; because that of itself does not show any agreement, or intent to alter the interest or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been so determined; for it seems, that, to make interest on a mortgage principal, it is requisite there should be a *writing* signed by the parties, *the estate in the land being to be charged therewith*.

*Brown v. Barkham*, 1 P. Wms. 652.

|| As equity considers the interest converted into principal in the light of a *further advance*, it follows that the mortgagee cannot convert interest into principal against a subsequent encumbrancer, of whose charge he had notice at the time of the agreement respecting interest.

*Digby v. Craggs*, Amb. 612; 2 Eden, 200.

In a late case, one Bassett had executed a mortgage to Brooman for 750*l.*, and interest half-yearly. He subsequently executed a second mortgage to the same mortgagee for 1200*l.*, which was composed of the principal and interest on the first mortgage, and of interest on that interest. The mortgage was assigned to Sackett, who filed his bill of foreclosure against Bassett and Brooman. On the usual reference to the master, he reported his opinion that nothing was due on the second mortgage, on the ground of its being usurious; and that nothing was due on the first mortgage, it having been satisfied by the second. For the assignee of the mortgage it was contended that the second mortgage was valid, because the interest having become due was a *debt* recoverable at law; but that even if it were usurious, yet the first mortgage was good. The Vice-Chancellor directed an issue on the covenant to try whether the second mortgage was usurious or not.

*Sackett v. Bassett*, 4 Madd. 58.]

Lord Keeper North was of opinion, in the case of *Howard v. Harris*, that if there were a covenant in the mortgage-deed for payment of the interest, upon which an action of debt would lie, the court would allow interest on interest, though no account was taken before a master. In that case, a mortgage for 1000*l.* had been made upon a reversion ten years, and in the deed there were covenants for payment of the principal and 6*l.* *per annum* interest, and 7*l.* *per annum* rent was *only* reserved; and it was urged, that the mortgagee, against whom the bill was exhibited to redeem, ought, in this case, to have interest upon interest, otherwise he would be a great loser. To which it was answered, that the bill had been filed six years, and that the mortgagee had, by answer, opposed the redemption, and therefore, from that time, he had no pretence for an allowance of interest for his damages; and that it was never known in the court that interest upon interest was at any time allowed in such case. But the Lord Keeper was clearly of opinion, that as to so much interest as was reserved in the body of the deed, that ~~should~~ be reckoned principal; for it being ascertained by the deed, an ac-



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tion of debt would lie for it, and therefore it was reasonable that there should be damages given for the non-payment of that money. As to what had been urged, that this had never been practised, and that there was not any such precedent in the court, and that if this were to be established for a rule, every scrivener would reserve all his interest, half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice of the court, and make all mortgagors pay interest upon interest; the Lord Keeper said, that he was clear in the distinction between debt and damages, and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a year, *for which* the mortgagee might have *sued at law*, and *recovered damages*.

Howard v. Harris, 2 Ch. Ca. 147—150; S. C. 1 Vern. 194; 1 Vent. 364.] [This case is not law; it was overruled in effect in Proctor v. Cowper, Prec. Cha. 116; 2 Vern. 377; and has been since considered of no authority; and see Coote on Mort. 441, 4 Madd. 64, note.]

If A mortgages for 450*l.* payable at the end of five years, with interest at 5*l.* *per cent.* in the mean time, and about two months before the end of the five years the mortgagee assigns over the mortgage for 560*l.*, being the principal and interest then due, the 560*l.* shall carry interest, though the five years were not elapsed, the mortgage being forfeited by the non-payment of interest.

2 Vern. 135, Gladman v. Henchman.

[A bill was to have the redemption of a mortgage of the manors of B and S, in the county of C, which mortgage had been assigned to F; one point was, Whether, there being great arrears due at the time of the assignment, which were paid by F, the money paid for interest, *then* in arrear, should be reckoned principal as to him, and carry interest with it? And it was insisted for the mortgagor, that interest was never made principal in such case, unless the mortgagor had joined in the assignment; and the case of Porter and Hubbard was cited, where, in a like case, it was decreed that interest should be reckoned principal; but the decree was reversed in the House of Lords, because the executor of the mortgagor was no party. But the Lord Keeper said, *that* precedent could not weigh much with him; he was of counsel therein, and it was hard in all its circumstances. For although he thought it reasonable that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent. However, his lordship directed the defendant's counsel to search for precedents, and said, that if they could find any one he would follow it in this case; but no such precedent could be found.]

Earl of Macclesfield v. Fitton, 1 Vern. 168; Porter v. Hubbard, 2 Ch. R. 86; ¶S. C. 3 Ibid. 78, Nels. 150.]

But, where creditors procure a decree for sale of an estate before a master, and one (by consent of all parties entitled to the estate, being confirmed the best bidder by authority of the court, all the encumbrancers agreeing he shall be purchaser) takes an assignment of all encumbrances; in this case, he will be a creditor of the mortgagor for the whole sum, as well what he paid for interest due, as for principal, together with interest upon the inte-

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rest, their consent being the same thing as if they had been made parties to the assignment.

*Ashenurst v. James*, 3 Atk. 271.

But, where G, in 1641, made a mortgage in fee of lands, worth about 30*l. per annum*, to C, to secure 300*l.*; in 1652 the mortgagee took possession, and in 1660 devised the lands to A; in 1680 the devisee brought a bill to foreclose; the wife of the mortgagor had recovered a third part, as dower, against the mortgagee, so that the profits did not answer the interest of the money, which was then 8*l. per cent.*, and there had been infancies on the plaintiff's part for several years; the Master of the Rolls decreed the plaintiff to redeem, and pay 8*l. per cent. only*, that being then legal interest; and said, that though the profits were not sufficient to answer the interest, yet the arrears could not carry interest, although the costs and charges must.

*Proctor v. Cooper*, Prec. Ch. 116; Trin. 1700.

A master's report, computing interest, makes that interest principal, and to carry interest; for a report is as the judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the party's disobedience to the court, in not complying with the time of payment, ought to subject him to interest.

*Bacon v. Clerk*, 1 P. Wms. 478; Prec. Ch. 500; S. C. Eq. Ca. Abr. 530, 9. ¶In case of a mortgage, interest is computed on the whole sum of principal and interest reported due; but in case of bonds and legacies, only on the principal. *Turner v. Turner*, 1 Jac. & Walk. 47; and see 1 Bro. Ch. Ca. 574.¶

But the report must be confirmed; for where A, the defendant, insisted that 800*l.* was owing to him, and, upon the master's report, only 180*l.* appeared due; the court ordered interest for that sum from the time of confirming the report absolute, *and not before*; because, until then, it was not any liquidated sum.

1 P. Wms. 453, 480; *Kelly v. Lord Bellew*, 1 Brown's Parl. Ca. 202; *Ibid.* 566; *Mosely*, 27; *Attorney-General v. Islington Overseers et al.*, 1 P. Wms. 376, 377; 2 Eq. Ca. Abr. 530.

Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report.

*Mosely*, 247.

And although the report be confirmed, yet, if the suit be for a sale, and not to foreclose, interest shall not carry interest, if there be other mortgagees, and bond creditors, parties thereto. Thus, the plaintiff, a mortgagee, brought a bill, in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premises, and had a decree accordingly, with a direction to pay the mortgagee his principal and interest in the first place. The master made a report of a stated sum due, which was confirmed; the mortgagee then moved, that the master might compute subsequent interest and costs upon the sum reported due. There was not near enough arising from the sale to pay the second mortgagee and the bond creditors. The rest of the creditors and the mortgagor opposed this motion, and endeavoured to show a difference between the present bill and a bill of foreclosure, insisting that, in the latter, the court directs the master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest of the other

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creditors was concerned; therefore, it would be hard to give interest upon interest in favour of one creditor, to the prejudice of the rest. And the Lord Chancellor allowed the distinction, saying, that it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carried *6l. per cent.*, and proposed to the counsel, that, from the time of the master's report being confirmed, it should carry only *4l. per cent.*, in which the plaintiff acquiesced.

*Harris v. Harris*, 3 Atk. 722.

Where the court enlarges the time for a mortgagor, or a subsequent mortgagee, that is a favour, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal, interest, and costs are lumped into one sum by a master; if the mortgagor, or a puisne mortgagee, pray longer time to redeem, they always pay interest for the whole sum.

*Neal v. Attorney-General, Mosely*, 246, 247.] [See *Bickham v. Cross*, 2 Ves. 471.]

|| WHAT TENDER SHALL HAVE THE EFFECT OF STOPPING INTEREST. ||— If the mortgagor tenders the money, and the mortgagee refuses, he loses the interest from the time of the tender; because it is but a pledge for the money, and if the money be tendered, he ought not to keep the pledge; and no man ought to pay for the forbearance when he hath the money ready.

*Chan. Ca. 29; 2 Chan. Ca. 206.*

The plaintiff had made a mortgage in fee of his estate, which by several mesne assignments was come to Sir William Dodwell, and there being likewise two several terms for years standing out, they were assigned to trustees, in trust for Sir William Dodwell to protect the inheritance, and subject to the same equity of redemption: the plaintiff and Sir William settled an account of what was due; and there appearing to be due thereon 4400*l.* principal money, the interest was then paid off, and at the same time Sir William Dodwell gave a note, whereby he promised, that on payment of the sum of 4479*l.*, or thereabouts, on the 23d October then next, being the interest computed to that time, he would reconvey the inheritance to the plaintiff and his heirs, and would procure his trustees to assign the two terms for years, as the plaintiff should direct. In August following, Sir William Dodwell died, and the defendants were his executors; and he likewise left the defendant Mary his only child and heir at law, an infant of about eight years of age; the plaintiff provided the money, and on the 23d of October tendered a bank-bill of 4500*l.* to one of the executors, (there being four in all,) for him to take thereout what was then due for principal and interest; but the executors having none of them proved the will, he refused to accept the tender; upon which the plaintiff asked him, if he objected to the legality of the tender, being in a bank-bill and not in money, and that if he did, he would immediately turn it into money; to which the other answered, he had no objection to the tender, but not having proved the will, he could not accept of the money. Afterwards the plaintiff made the like tender to another of the executors, who likewise refused to accept of it, not having proved the will; but he objected to the legality of the tender, not being in money. Afterwards all the four executors proved the will; and the bill was brought to redeem, on payment of 4400*l.* and interest, to the 23d October, being the time mentioned in the note, and that the plaintiff might not

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be obliged to pay interest beyond that time, as the executors insisted he ought. And it was held by my Lord Chancellor, that this tender in a bank-note was not, strictly speaking, a legal tender; (a) but since it was proved the plaintiff offered to turn it into money, that made it a good tender. 2dly, It was clearly agreed, that any or either of the executors, before probate, might have received, and given a good discharge for the money, especially when, as appeared in this case, they afterwards proved the will, and so were executors *ab initio*. 3dly, That though they were executors only in trust for the daughter, who was an infant, yet none of them could be in a better case than Sir William Dodwell himself would have been, if he had been living; and as such tender, under these circumstances, would have bound him, so it will his executors and devisee; and therefore decreed a redemption on payment of the 4400*l.* and interest to the 23d October, the time mentioned in the note, and no longer, and no costs on either side: and the infant heir at law, on payment of the money to the executors, was to convey the inheritance descended to her, according to the act 7 Ann. c. 19, for obliging infant trustees and mortgagees to assign and convey.

Abr. Eq. 318, 319, Sir John Austen v. Executors of Sir William Dodwell. [Vide Meade v. Earl of Brandon, 2 Dow. 268.] (a) Although it hath never yet been determined, that bank-notes are a legal tender, yet the Court of King's Bench have holden, that if such notes are presented in payment, and no objection made to the receipt on that account, they are a *good tender*. Wright v. Reed, 3 Term Rep. 554. [Vide Bidulph v. St. John, 2 Scho. & Lef. 534; Grigby v. Oakes, 2 Bos. & Pul. 526.]

[Although, according to the above case, a mortgagee refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender, yet notice of paying off the mortgage must have been given to the mortgagee at least *six calendar months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very* day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord Hardwicke not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made.

Hix v. Ling, before Lord Hardwicke, Pow. Mortg. 933, (6th ed.); [S. C. 5 Supp. Vin. Abr. 261.]

But, it seems, the plaintiff ought to make oath that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagor was not ready to pay it, in which case the interest must run on.

Sutton v. Rodd, 2 Ch. Ca. 206; Gyles v. Hall, 2 P. Wms. 378.

A tender must be made by a person actually interested; and, accordingly, it was said by Croke to have been adjudged, Trin. 27 Eliz., that where one, who was not guardian, nor was to have any interest in the land, tendered money upon a mortgage for an infant, it was adjudged a void tender.

Watkins v. Ashwicke, Cro. Eliz. 132; and see *per* Lord Eldon, 3 Swanst. 237, 241. [The above case in Croke is reported more at large in Owen, by the name of Watkins and Astwick, and is thus stated:—A man made a feoffment on condition, that if he, his heirs or executors, did pay 100*l.* before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested I S that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. Clinch said, that if the jury had found that the son was of the age of seventeen years, the payment had been good. But by Wray, if a bond

## (F) Mortgagees and their Assignees, how to account, &amp;c.

be upon condition, that the obligor or his heirs shall pay 100*l.*, and the obligor die, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards, all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore, they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years. Owen, 137.

The money being a sum in gross, and collateral to the title of the land, the mortgagor must tender it to the *person* of the mortgagee, and it is not sufficient for him to tender it *upon the land*.

Co. Lit. 210 b; 2 Eq. Ca. Abr. 603, 34.

But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee, or be in any other place but in that comprised in the indenture, or *there* longer than the time specified therein.

Co. Lit. 211 b; 212.

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off. Thus, where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at Lincoln's Inn Hall, at a day and hour appointed therein, which accordingly was done; it was objected, that Lincoln's Inn Hall was not named in the proviso in the mortgage-deed as the place for payment, and therefore that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to Oxford, where the mortgagee lived.

Gyles v. Hall, 3 P. Wms. 378. ¶ See Lansdown v. Lansdown, 2 Bligh, R. 60.¶

In some cases, a tender at the house of the mortgagee will be sufficient. Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, said to him, I have moneys now; I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness. And a like determination was made in the case of Peckham and Legay.(a)

Manning v. Burgess, 1 Ch. Ca. 29. ¶ (a) Cited 1 Ch. Ca. 29.¶

But, if there be a deed of assignment presented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and shall have reasonable time allowed him so to do before the interest shall stop. Thus, a bill was brought in May, 1742, to redeem a mortgage, in which the plaintiff insisted upon a redemption, on paying the principal money only, for that the interest ought to determine in February, 1741, because he had given six months' notice to pay it off, and had, on that day, tendered the principal and interest, with a deed of assignment, but the defendant absolutely refused to take the money;

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the defendant swore, that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, there being covenants therein on his part, upon which, as he was not of the profession of the law, it was reasonable he should consult his attorney, whether they were such as he might safely execute. And the Lord Chancellor said, that the plaintiff, not having sent a draught of the assignment to the defendant any time before the money was tendered, as he ought to have done, he was in the wrong; for where there were covenants on the part of the mortgagee, it was very reasonable that he should have some time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to advise upon it, and should have appointed a time to pay the money, after the defendant had had sufficient time to consider it. And his lordship decreed the mortgage-money, with interest, to be paid within six months, otherwise the plaintiff's bill to stand dismissed.

Wiltshire v. Smith, 3 Atk. 90; [S. C. 9 Mod. 441.]

So, if there be a controversy, to whom the equity of redemption belongs, no assignment can be made until that point is settled; therefore the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it.

Sharpnell v. Blake, 2 Eq. Ca. 603, 34.

Lord Milton being possessed, under a conveyance from his father, of divers mortgaged premises, and all the securities for the same, and entitled to all the money due thereon, filed his bill in the Court of Exchequer in Ireland, in June, 1764, against Moore Edgeworth, and Damer Edgeworth, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cause, and for an account; and that the money which should appear due thereon might be paid the plaintiff by a short day, or that the defendants might be foreclosed, and the mortgaged premises sold for payment of what should appear due. The defendants, by their answer to this bill, admitted most of the matters therein stated; but insisted upon the benefit of an agreement, which they alleged had been made between the plaintiff's father, John Damer, and the father of the defendants, for reducing the interest of the said mortgages, which, by the deed, was originally at 8 *per cent.*, to 6 *per cent.* Issue being joined in the cause, several witnesses were examined; and the same came on to be heard in November, 1771; when, (upon reading an answer put in by the said John Damer, in 1758, to a bill filed against him by the defendant's father in 1757, whereby the former admitted, that, pending a former suit, the said defendant's father had told the said John Damer, "That the debts affecting the estates mortgaged were so great, that if John Damer did not make an abatement in the interest of the money due to him he would have little benefit in case he succeeded in the said suit;" and that Damer then said, "that if that should be the case, he would leave any reasonable abatement to his friend Ambrose Harding." Whereby it appeared, that such conversation had passed between them; and that the said Ambrose Harding understood that Damer had agreed to accept 6*l.* *per cent.* interest upon the money so due to him on the said securities; and also, upon reading other evidence, the court made an order, directing an issue to be tried at the next assizes, "Whether there was any and what agreement between John Damer, esq., deceased, and Packington Edgeworth, deceased, at any and at what time, for any and what abatement

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of interest, on the principal sums due to the said John Damer?" From this order Lord Milton appealed to the House of Lords, and the principal objection urged by him against directing such issue was, that considering the state of the evidence before the court, it was unjust to direct an issue; because the answer of Mr. Damer, which was read by the defendants at the hearing, denied any agreement between him and Packington Edgeworth, to reduce the rate of interest; and this denial, being set in opposition to any conclusion drawn from Harding's evidence, took away all ground for the court's interposing: whereas, by directing an issue, upon the trial of which Mr. Damer's answer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cause. But it was adjudged that the order should be affirmed, with this addition, viz. that the plaintiff should be at liberty at such trial to read the answer of Damer.

Lord Milton v. Moore Edgeworth and Damer Edgeworth, infants, 6 Brown's Ca. Parl. 580.

Interest due upon a mortgage of money which is in settlement will not be considered as in the nature of rent, and, consequently, go with the mortgage; but if the tenant, under the settlement, die in the broken part of the quarter or half-year, the interest will be apportioned; and what is due from the last day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the residue to him in remainder.

Edwards v. Countess of Warwick, 2 P. Wms. 171.

The reason is, that interest increases on a mortgage from day to day; and the mortgagor, whenever he pays the principal and interest, must pay the interest up to the day of payment.

Wilson v. Harman, 2 Ves. 672. [See Wade v. Wilson, 1 East, 199.]

In this, a mortgage likewise differs from stock, for dividends upon stock are by the legislature made payable only half-yearly, and are in nature of rents, and, consequently, not liable to apportionment.

Wilson v. Harman, 2 Ves. 672.

|| A question has arisen, whether a devisee of an equity of redemption, in suing to redeem, could be allowed to set off against the principal money and arrears of interest due at the death of the mortgagor, a sum of money due for arrears of interest on a legacy given by the mortgagee to the mortgagor, and which had not been received by the mortgagor; and it was decided that he could not, but must pay the whole principal money and interest. The Master of the Rolls allowed, that if the parties had settled accounts the day before the mortgagor's death, the accounts must have been taken in the way the devisee intended, but it did not follow that the account after King's death was to be so taken. In our law, the debt still subsisted; and it was only by a process in our courts that the adjustment took place, though by the civil law it operated *ipso jure*. Until that adjustment, the debts might be separately assigned, for they were not extinguished.

Petat v. Ellis, 9 Ves. 563. ||

On the statute 12 Ann. stat. 2, c. 16, § 1, which enacts, "That all bonds and assurances for the payment of any principal, or money to be lent upon usury, whereupon there shall be reserved or *taken* above five in the hundred, shall be utterly void;" parol evidence has been admitted to show *usurious*

## (G) Of Mortgages of Personal Property.

interest *taken* by a mortgagee, though there was none reserved upon the face of the deed itself.

*Adlington v. Cann*, 3 Atk. 154.] ¶Vide *post tit. Usury*, (B).]

A mortgagee of a slave, who appears to have acted in good faith in hiring him out, and to have rendered a true account of the hire; held to be chargeable with no more, though the slave might have been hired for more.

*Clark v. Robbins*, 6 Dana, 350. See as to the hire of slaves by a mortgagee, *Woodward v. Fitzpatrick*, 2 B. Monr. 61; *Field v. Beeler*, 3 Bibb, 18; *Fenwick v. Macy's executors*, 1 Dana, 286; *Wilkins v. Sears*, 4 Monr. 348.

It is a general rule, though not without exception, that a mortgagee in possession is not allowed for new improvements erected upon the premises.

*Dougherty v. McColgan*, 6 Gill & Johns. 275; *Murphy v. Mead*, 1 Jones' Exch. 620; *Moore v. Cable*, 1 Johns. Ch. 385.

But expenditures for necessary repairs are allowable.

*Quin v. Britain*, 1 Hoff. 353; *Brainbridge v. Owen*, 2 J. J. Marsh. 465; *Rawlings v. Stewart*, 1 Bland, 22.

The mortgagee will not be allowed a charge against the mortgaged premises for insurance against fire, unless by express agreement of the mortgagor or of the owner of the estate.

• *Faure v. Winans*, Hop. 283.

While he is in possession of the premises, the mortgagee is bound to make all reasonable and necessary repairs.

*Dexter v. Arnold*, 2 Sumn. 108.

A mortgagee in possession of the premises will be made to account for all loss and damages occasioned by his gross negligence in respect of bad cultivation and non-repairs of the premises.

*Weagg v. Denman*, 9 Yo. & Coll. 117.

When the mortgagee takes possession of the mortgaged premises before foreclosure, and occupies them himself, he must account for the rents and profits, at the rate of rent which the premises, by ordinary care, would have produced, after deducting the taxes and repairs.

*Van Buren v. Olmstead*, 5 Paige, 9; *Brainbridge v. Owen*, 2 J. J. Marsh. 65; *Eaton v. Simonds*, 14 Pick. 98.

A mortgagee in possession is accountable for the rents received, and no further, unless he has been guilty of gross negligence; (a) but he is not accountable for interest on the rent. (b)

(a) *Robertson v. Campbell*, 2 Call, 421; *Saunders v. Frost*, 5 Pick. 260; *Metcalf v. Camplin*, 1 Moll. 238. (b) *Breckenridge v. Brooks*, 2 A. K. Marsh. 239.

## (G) Of Mortgages of Personal Property.

A MORTGAGE of personal property is somewhat similar to a pawn, but is distinguishable from it. By a conveyance of goods in gage or mortgage, the whole title passes conditionally to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law, though equity will interfere to compel a redemption. But in a pledge, a special property only passes to the pledgee, the general property remaining in the pledger.

How. L. D. *Mortgage*.

When the mortgage is silent on the subject, the mortgagee of goods is entitled to immediate possession.

*Cann v. Winship*, 4 Blackf. 425.



## (G) Of Mortgages of Personal Property.

To make a valid mortgage of goods, the possession must in general be in the mortgagee.

Clow v. Woods, 5 S. & R. 278; Portland Bank v. Stubbs, 6 Mass. 422; Gale v. Ward, 14 Mass. 352; Tucker v. Buffington, 15 Mass. 477; Bedlam v. Tucker, 1 Pick. 389; Bonsey v. Amee, 8 Pick. 236; Bullock v. Williams, 16 Pick. 33; see Morgan's executors v. Biddle, 1 Yeates, 3; Wilt v. Franklin, 1 Binn. 521; Dawes v. Cope, 4 Binn. 258; Cunningham v. Neville, 10 S. & R. 202; Babb v. Clemson, 10 S. & R. 419; Eagle v. Eichelberger, 6 Watts, 29; M'Culloch v. Hutchinson, 7 Watts, 434; Hoofsmith v. Cope, 6 Whart. 53; Holbrook v. Baker, 5 Greenl. 309; Gardner v. Adams, 12 Wend. 297; Look v. Comstock, 15 Wend. 244.

There have been cases of mortgages of chattels, which have been held valid without any actual possession of the mortgagee; but these stand upon peculiar grounds, and may be deemed exceptions to the general rule.

Homes v. Crane, 2 Pick. 607; 5 Pick. 59; 5 Johns. 261.

A mortgage of a factory and of machinery "soon to be placed there;" the mortgagee did not take possession, and the mortgagor occupied the premises as formerly. An attachment was afterwards issued against the mortgagor, and the property attached, and a person in the factory was appointed keeper by the sheriff. The keeper subsequently absconded, and the mortgagee took possession of the mortgaged property, including what had been attached. Held, that the possession by the mortgagee, of the property attached, after the custody was lost by the sheriff, completed the title of the mortgagee.

Carrington v. Smith, 8 Pick. 419.

Where the mortgaged property, by an agreement contained in the mortgage, was to remain in possession of the mortgagor, and it did so remain; but before any attachment or levy was made on the same, the mortgagee took possession; it was held, that the mortgage was valid against creditors, although the property was not removed.

Adams v. Wheeler, 10 Pick. 199.

If the mortgagor of articles of personal property belonging to a business establishment, dispose of such articles and convert them into money, and buy other articles with the avails, the title to the latter will not, by mere operation of law vest in the mortgagee; but if they are procured for the simple purpose of replenishing the establishment mortgaged, by supplying the place of lost or worn-out articles belonging to it, and they become attached to or incorporated with it, they by right of accession follow the principal.

Holly v. Brown, 14 Day, 255. See Winslow v. Merchants' Ins. Co., 4 Metc. 306.

When personal property has been mortgaged, the possession may, in some instances, remain with the mortgagor. But if the mortgagor, while in possession, sell or pledge the property to a *bonâ fide* purchaser or pledgee, his rights will be paramount to those of the mortgagee.

Lewis v. Stevenson, 2 Hall, R. 63.

The mortgage on the stocks without possession will not avail, by way of hypothecation, against attaching creditors.

Goodenow v. Dunn, 21 Maine, 86.

A, for a valuable consideration, takes a security upon a reversionary sum of stock, at a time when, by reason of the death of the person in whose name the stock stood, without legal representatives, no notice of the encumbrance could be given to the trustee of the fund. A does not attempt, by *disstrings* or otherwise, to perfect his security. Afterwards B, for a valuable consideration, and without knowledge of A's encumbrance, takes a security upon

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the same fund, and at the same time serves a writ of *distringas* on the Bank of England. B's security has a priority over that of A.

Etty v. Bridges, 2 Y. & C. 486.

Where both proved that a bill of sale, though absolute in its terms, was intended only as a collateral security for a debt due, and this was done with good faith; the transfer was holden to be a valid mortgage.

Read v. Jewett, 5 Greenl. 96.

The issue of a mortgaged slave, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt.

Iglehart v. Merriken, 8 Gill & Johns. 39.

## (H) Of Disputes among Mortgagees.

A applies to B for a loan of money upon a security of a mortgage of slaves then held by A, and B, being doubtful as to A's title to the slaves, and apprehensive that C has some claim to them, applies to C to know whether he has such claim, explaining the reason of his inquiry; upon which, C informs him that he has no right to the slaves, being at the time apprized of all the facts on which his right, if any he has, depends; B lends the money and takes the mortgage of the slaves. Held that, in equity, C cannot be allowed to assert the right he had disclaimed against the mortgagee B.

Dickinson v. Davis, 2 Leigh, 401.

A purchases lands of B, and to secure the purchase-money, payable in instalments, conveys the same land to a trustee upon trust to permit A to take the profits thereof, to his order, use, and benefit, till the time appointed for the payment of the last instalment, and then in default of payment to sell the subject and apply the proceeds to the satisfaction of the debt; afterwards, and before the last instalment of the debt falls due, A mortgages the same lands, and all yearly rents, issues, and profits thereof, and all his right and interest therein to C to secure a debt due to him; held, that C is entitled, in preference to B, to all the profits accruing prior to the time when the last instalment of the debt to B falls due.

Little v. Brown, 2 Leigh, 353.

A second mortgagee took a conveyance of the equity of redemption, in consideration of debts due to himself and other mortgagees, which he thereby took upon himself and covenanted to pay; held, that his debt was extinguished, and, therefore, that in a foreclosure suit instituted against him, by the parties entitled to the first and third mortgages, he was not entitled to be paid his debt in priority to the third mortgage.

Brown v. Stead, 5 Sim. 535.

A subsequent mortgagee who seeks to redeem from the purchaser under a statute foreclosure of a prior mortgage, is not bound to pay the costs of such foreclosure, which foreclosure, as to his rights, is wholly inoperative.

Vroom v. Ditmas, 4 Paige, 526.

Junior encumbrancers, known to the senior mortgagee, should be parties to his bill for a foreclosure.

Cooper v. Martin, 1 Dana, 25.

Where an estate is mortgaged, and the mortgagee assigns the mortgage to a third person, and subsequently takes a quit-claim deed from the mort-

## Murder and Homicide.

gagor, the mortgage title does not merge in the fee. The mortgagee then becomes mortgagor, and the assignee mortgagee.

Pratt v. Bank of Bennington, 10 Verm. 293.

Where a mortgage has been cancelled and discharged, and a new security on the land has been taken for the debt, the mortgage is to be considered as if it had never existed, and intervening encumbrances are let in.

Stearns v. Godfrey, 4 Shepl. 158.*g*

## MURDER AND HOMICIDE.

THE taking away the life of another, whether it amount to felony or not, is called by the general name of homicide, and is thus branched out and distinguished by our law:—

1. Into *murder*, which is usually defined the wilful killing of a person through malice prepense. And it is said, that anciently it signified only the private killing of a man, for which, by force of law, introduced by King Canutus, for the preservation of his Danes, the town or hundred where the fact was done was (a) amerced, unless it could be (b) proved that the person slain was an Englishman, or unless they could produce the offender. And this law was provided to avoid the secret murder of the Danes, who were hated by the English, and oftentimes privately murdered by them.

Bract. 134; Stamf. 17; Kelyng, 121; and vide Fortescue's Pref. to Absolute and Limited Monarchy, 59. (a) The amercement was forty-six marks, Wilk. Sax. Law, 280. (b) This proof was called Engleshire, and was various according to the custom of several places, but most ordinarily it was by the testimony of two males, of the part of the father of him that was slain, and by two females of the part of the mother. Hal. Hist. P. C. 447.

But this law having been abolished by 14 E. 3, the killing of any Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder, and punished with death. But by the common law, as also by the statute of 25 E. 3, c. 4, clergy was promiscuously allowed, as well in case of murder as of homicide or manslaughter, before the statutes of 23 H. 8, c. 1, 25 H. 8, c. 3, 1 E. 6, c. 12, 5 & 6 Ed. 6, c. 10, by which clergy is taken away from murder *ex malitia præcogitata*.

Hal. Hist. P. C. 450; Hawk. P. C. c. 31, § 2.

2. *Manslaughter*, by which is understood such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all, and in which the offender is allowed his clergy, though it be felony, and differ from murder only in degree and quality. Hence it is, that upon an indictment of murder, the party offending may be acquitted of murder, and yet found guilty of manslaughter, as is every day's practice. As it is done without premeditation, it is held that there can be no accessories to it before the fact.

3 Inst. 55; Dalt. c. 94; Hal. Hist. P. C. 450; Hawk. P. C. c. 30, § 1.

A. In what Cases a Man may be said to kill another.

1. Homicide *per infortunium*, or *chance-medley*, is, where a man doing a lawful act, without any intent of hurt, unfortunately chances to kill another; and though this be not felony, yet, as the king hath lost a subject, and in order to make men the more careful of their actions, the law punishes the offender with the loss of his goods. •

Hal. Hist. P. C. 477; Hawk. P. C. c. 29, § 1.

4. Homicide *se defendendo*, is, where one who has no other possible means of preserving his life from one who combats with him, on a sudden quarrel, kills the person, by whom he is reduced to such an inevitable necessity. And in this case, as in the former, the party forfeits his goods, though it be not felony.

Hal. Hist. P. C. 478; Hawk. P. C. c. 29, § 13.

*Justifiable homicide*, is, 1st, Where, in defence of a man's house, he kills one who attempts to burn it, or to commit in it murder, robbery, or other felony. 2dly, Where, in defence of a man's person, he kills one who assaults him in the highway, with an intent to murder or rob him. 3dly, When the killing happens in the advancement and due execution of public justice; and where a felon flies from those who endeavour to apprehend him, &c. And this is so far from being felony, that it causes no forfeiture whatsoever.

Hal. Hist. P. C. 494; Hawk. P. C. c. 28.

But for the better understanding these several species of homicide, it will be necessary to consider,

(A) In What Cases a Man may be said to kill another.

(B) Who are such Persons, by killing of whom a Person may be said to commit Murder.

(C) What shall be deemed Murder: And herein,

1. Where it shall be said to be express Murder, and of Malice Prepense.
2. Where the Malice shall be said to be implied, or by Presumption of Law: And herein,

1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.
2. When done on an Officer or Minister of Justice.
3. When done by Persons in the Execution of some other unlawful Act.
4. Mala praxis.

(D) Of Manslaughter: And herein of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1, c. 8.

(E) Of Justifiable Homicide: And herein,

1. As it happens in the due Execution and Advancement of Public Justice.
2. As it happens in the Defence of a Man's Person, House, or Goods.

(F) Of Excusable Homicide: And herein,

1. Of Homicide *per Infortunium*, or *Chance-medley*.
2. Of Homicide *se defendendo*.

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(A) In what Cases a Man may be said to kill another.

As there are as many ways of killing, as there are modes by which one may die, *moriendi mille figure*, it is laid down in general, that not only he,

(A) In what Cases a Man may be said to kill another.

who by a wound or blow, or by poisoning, strangling, or famishing, &c., directly causes another's death; but also, in many cases, he, who by wilfully and deliberately doing a thing, which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

3 Inst. 48; Palm. 548; Hal. Hist. P. C. 431, 432; 1 Hawk. P. C. c. 31, § 4.

Hence, in the case of that unnatural mother, who left her child in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof, it was adjudged murder.

Crompt. 24 b; Dalt. c. 93; Hal. Hist. 432; 1 Hawk. P. C. c. 31, § 6.

So, in the case of that unnatural son, who carried his sick father, against his consent, in cold frosty weather from one town to another, by reason whereof he died.

Crompt. 24 b; Pult. 122; Dalt. c. 93; Hale's Hist. 432; 1 Hawk. P. C. c. 31, § 5.

||So, in the case of a mother who left her child in a hog-sty, and it was devoured.

1 East, P. C. 226.]

So also, where parish officers shifted a child from parish to parish, till it died for want of care and sustenance.

Ibid. Palmer, 548. A married woman cannot be convicted of the murder of her illegitimate child, three years old, by omitting to supply it with proper food, unless it be shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. Rex v. Saunders, 7 Carr. & P. 277.

So, if by duress of imprisonment a prisoner die, it is murder in the jailer. And this duress is said to be inflicted on every one, that by the usage of his keeper is brought nearer to death and further from life; and therefore it is said, not to be material whether it proceeds from the neglect and carelessness of the jailer, or from any actual violence; and may be effected by confining the prisoner too closely in a noisome place, loading him with fetters, &c. (a)

Britt. c. 11, § 38; Fitz. Indictment, 3; Lamb. 240; Stamf. 36; 3 Inst. 52; Palm. 548; Hale's Hist. 466.—And that therefore where any person dies in jail, the coroner ought to be sent for to inquire of the manner of his death. Hale's Hist. 432. [(a) A jailer, knowing that a prisoner infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, against his will, in the same room. The second prisoner, who had not had the distemper, of which the jailer had notice, caught the distemper, and died of it. This was holden to be murder in the jailer. 2 Str. 856; Fost. Cr. L. 322. Another straitly confined his prisoner in a low, damp, unwholesome room, without allowing him the common necessities of chamber-pot, &c., for keeping things sweet and clean about him. The prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was holden to be murder in the party guilty of the duress. 2 Str. 884; 2 Ld. Raym. 1578; Fost. Cr. L. 322.]

||So, where a master upon his apprentice returning from Bridewell, (whither he had sent him for misbehaviour,) in a distempered condition, did not take proper care of him, but made him lie on the boards, and procured him no medical aid, and the apprentice died, the court left it to the jury to consider whether the death of the apprentice was occasioned by the ill treatment of the master, and whether that ill treatment was evidence of malice, in which case they were to find him guilty of murder.

Self's case, 1 East, P. C. 226, 227; and vide case of Squire and wife, 1 Russell on Crimes, 621.]

So, where one, by duress of imprisonment, compels a man to accuse an innocent person, who, on his evidence, is condemned and executed; this is

...the owner is liable for the damage done by the animal.

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## (A) In what Cases a Man may be said to kill another.

of the ox, &c., and use all due diligence to keep him up, yet the ox break loose, and kill a man; this is no felony in the owner, but the ox is a deodand.

Hale's Hist. 431.

5. But if he do not use that due diligence, but through negligence the beast go abroad, after warning or notice of his condition, and kill a man, it is manslaughter in the owner.

Hale's Hist. 431.

6. But if he did purposely let him loose, or wander abroad, with design to do mischief; nay, though it were with design only to fright people, and make sport, and it kill a man, it is murder in the owner; and this, he says, he had heard had been so ruled at the assizes held at St. Albans; but he adds, this is only a hearsay.

[Whether taking away the life of an innocent man by perjury in a course of legal proceeding amount to murder?

See *Fost. Cr. L.* 131; 4 *Bl. Comm.* 196, note;] §1 *East, P. C.* 333, note (a).]

If a physician gives a person a potion, without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a surgeon.

Hale's Hist. 429. ¶ If one assuming to be a physician, however ignorant of the medical art, administer to his patient remedies which result in death, he is not guilty of manslaughter, unless he has so much knowledge or probable information of the fatal tendency of his prescriptions that his acts must be the effect of obstinate, wild rashness. *Commonwealth v. Thompson*, 6 *Mass.* 134.

But some hold, that if a person, not duly authorized to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony. But this opinion, says my Lord Hale, is erroneous; for physicks and salves were before licensed physicians and surgeons; and therefore, if they be not licensed according to the statutes of 3 H. 8, c. 11, or 14 & 15 H. 8, c. 5, they are liable to the penalties in the statutes, but are not guilty of murder or manslaughter. And herewith agreeth Hawkins, who says, that the charitable endeavours of those gentlemen, who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. But as it is highly rash and presumptuous for unskilful persons to undertake matters of this nature, the law cannot well be too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those that have to do with them.

¶ *Stamf.* 16 b; *Pult.* 22 b; *Crom.* 27; 43 *E.* 3, 33 b; *Fitz. Coron.* 163; *Hale's Hist.* 429; *Hawk. P. C. c.* 32, § 62.

If a person, who is infected with the plague, having a plague-sore running upon him, goes abroad to the intent to infect another, and another is thereby infected, and dies; this, it seems, is murder by the common law. But, if no such intention evidently appear, though *de facto* by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanor. (a)

Hale's Hist. 432. ¶ (a) By 45 *G. 3*, c. 10, § 23, persons liable to perform quarantine, and persons having had intercourse with such persons, and not repairing to the lazaret,

THEY MAY BE KILLED BY THE HAND OF ANOTHER, OR POSSIBLY BY THE HAND OF GOD, IN ANSWER TO HIS JUST JUDGMENT OF GRIEF OR FEAR, THAT HE MAY CAUSE A MAN TO COMMIT SUICIDE, WHEREOF HE DIES; BUT THE MAN WHO KILLS HIMSELF BY HIS OWN HAND, THIS MAY BE MURDER OR MURDER BY GOD, BUT IT CANNOT COME UNDER THE CATEGORY OF SELF-KILLING. IF VIOLENCE WAS OFFERED, IT IS MURDER, AND ALL SECRET THINGS BELONG TO GOD.

IN CASE shall be adjudged, by the court, to be thereof within a year after the whole day on which the

...a barbarous assault with  
...yet recovered again, was  
...for the stroke without the  
...stroke, or other violence, makes

... within a year and a day, it is no  
... are recovered if he had not neglected

...but with all applications by the  
...moves or medicines, the party  
...the medicine and not the wound, was  
...But then that must ap-

... was ... for murder could be ...  
... her, but the point was

... producing a well-grounded  
... himself from a window in  
... liable for the consequences

and directed the person to give a tea-spoonful every night. The medicine was on the mantelpiece, where she kept the contents to the prisoner's child, and under these circumstances, the administering was done by the prisoner, as if she had

C. 120.

... persons together, who armed  
... the lawful constituted  
... constable who came  
... afterwards shot  
... him: held, that the



(B) Who are such Persons, by killing of whom a Person may be said to commit a Murder. others were guilty of murder as principals in the first degree, and that any apprehension they had of personal danger to themselves from A, was no ground of defence for remaining with him, after he had so declared his purpose.

*Reg. v. Tyler*, 8 Carr. & Payn. 616.g

(B) Who are such Persons, by killing of whom a Person may be said to commit a Murder.

It is agreed, that the malicious killing of any person, whatsoever (a) nation or religion he be of, or of whatsoever (b) crime attained, is murder.

Hawk. P. C. c. 31, § 15. (a) If a man kill an alien enemy within this kingdom, yet it is felony; unless it be in the heat of war, and in the actual exercise thereof. Hale's Hist. P. C. 433. (b) Though outlawed of felony, or attained in a *præmunire*, for the execution of the sentence must be by a lawful officer, lawfully appointed; and therefore, if a person be condemned to be hanged, and the sheriff behead him, this is murder, and the wife may have an appeal. Hale's Hist. P. C. 433.

If a woman be quick or great with child, if she take, or another give her, any potion to make an abortion, or, if a man strike her, whereby the child within her is killed; it is not murder nor manslaughter by the law of England, because it is not *in rerum natura*, and it cannot be legally known whether it was killed or not; though it be a great crime, and by the judicial law of Moses, was punishable with death. So, (c) if, after such child were born alive and baptized, and after die of the stroke given the mother, this is not homicide.

Hale's Hist. P. C. 433. (c) But this *per* Hawkins is clearly murder, notwithstanding some opinions to the contrary. Hawk. P. C. c. 31, § 16.

|| But now by statute 43 G. 3, c. 58, any person wilfully and maliciously administering poison, with intent to cause and procure the miscarriage of any woman then being quick with child, is declared a felon, and shall suffer death without benefit of clergy.

And by § 2, of the same statute, any person administering medicines, or employing any instrument or other means, to cause and procure the miscarriage of any woman not then quick with child, is declared guilty of felony, and shall be punished by fine, imprisonment, or transportation.||

But, if a man procure a woman with child to destroy her infant when born, and the child be born, and the woman, in pursuance of that procurement, kill the infant; this is murder in the mother, and the procurer is accessory to murder; and this, whether the child were baptized or not.

7 Co. 9, Dyer, 186; Hale's Hist. P. C. 433; Hawk. P. C. c. 31, § 17.

§ The North Carolina Act of 1817 declaring that the offence of killing a slave should be considered as homicide, as at common law, it was held that the murder of a slave was a felony of the same degree as the murder of a freeman, and therefore was ousted of the benefit of clergy, by the stat. 23 Hen. 8, c. 1.

*State v. Scott*, 1 Ruff. 24.

The design of this act was to make the killing of a slave where it is extenuate by legal provocation manslaughter, and to punish it as manslaughter of a free person.

*State v. Tackett*, 1 Hawkes, 210.g

|| As to the murder of bastards, vide tit. "BASTARDY," (E).||

(C) What shall be deemed Murder : And herein,

1. *What shall be said to be express Murder, and of Malice prepense.*

HEREIN it seems to be agreed, that any (a) formed design of doing mischief may be called malice ; and therefore, that, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be a malice prepense.

Hawk. P. C. 80. *β* As to what amounts to malice aforethought, see *United States v. Cornell*, 2 Mason, 91.*g* (a) My Lord Hale defines malice in fact to be a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized ; and the evidences of such a malice, says he, must arise from external circumstances discovering that inward intention ; as, lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances. Hale's Hist. P. C. 451. *¶* Vide, as to malice in a legal sense, Kel. 127 ; Russell on Crimes, vol. 1, 422, note (i), (2d edit.) *¶ β* Striking one on the head with an axe, without uttering a word, is evidence of premeditation. *Respublica v. Mulatto Bob*, 4 Dall. 146. See *Commonwealth v. Dougherty*, 1 Browne's R. Appx. xviii. ; *Pennsylvania v. McFall*, Addis. 257 ; *Commonwealth v. Green*, 1 Ashm. 289 ; *State v. Anderson*, 2 Tenn. 6 ; *Mitchell v. The State*, 5 Yerg. 340.*g*

*β* If death does not take place within a year and day of the time of inflicting the wound, the law draws the conclusion that it was not the cause of the death, and neither the court nor the jury can draw a contrary one.

*State v. Orrell*, 2 Dev. 58.*g*

If two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder ; and this the law adjudges to be of malice, and that the party cannot help himself by alleging, that he was first struck by the deceased, or that he often declined to meet him, and was prevailed upon to do it by his importunity ; or that it was his only intent to vindicate his reputation ; or that he meant not to kill, but only to disarm his adversary ; for since he deliberately engaged in an act highly unlawful, in defiance of the laws, he must, at his peril, abide the consequences thereof. And not only he who kills, but also his seconds, are guilty of murder. And some hold, (b) that the seconds of the deceased are also equally guilty.

Roll. Rep. 360 ; 2 Bulst. 147 ; Crompt. 22 b ; 1 Hawk. P. C. c. 31, § 21 ; Foster. Cr. L. 297. *¶* Vide 3 East Rep. 581. *¶* (b) By reason of the countenance they give, and it being done by compact and agreement. But this construction is said to be too rigid ; and that it would be hard to make a man, by such reasoning, the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 Hawk. P. C. c. 31, § 31 ; Hale's Hist. P. C. 453.

*β* By the common law, independent of any act of Assembly, it is murder to kill another in a duel.

*Smith v. The State*, 1 Yerg. 228.*g*

A man is esteemed to fight in cool blood, when he meets in the morning on an appointment over night ; or in the afternoon, on an appointment in the morning ; or, as some say, if he fell into other discourse after the quarrel, and talked calmly upon it ; or, if he have so much consideration as to observe, that it is not proper or safe to fight at present, for such and such reasons, which show him to be master of his temper.

Kel. 56 ; Sid. 177 ; Lev. 180 ; Oneby's case, 2 Stra. 773 ; 2 Ld. Raym. 1489.

*β* The prisoner assailed another, and was about to commit an act of violence

(C) What shall be deemed Murder. (*Malice.*)

upon him, when a third person interposed to prevent it, and he was killed by the prisoner; held to be murder.

*State v. Benton*, 2 Dev. & Bat. 196.*g*

[A and B, two brothers, were at play together; they then wrestled; afterwards cudgelled. A gave B a smart stroke; B grew angry, threw away his cudgel: they fought in earnest, and were parted. A went away angry, threatening to fetch something and stick B. He went home, took off a thin coat, and put on a thick one, returned with a sword concealed under his coat, drew on a discourse of the quarrel, and offered to cudgel, if B would keep off his hands. B went to him, and took up the cudgel which A dropped, and gave him two blows on the shoulders. A drew out the concealed sword, said, "Stand off, or I'll stab you," thrust at, but missed him. B went back, A shortened his sword, leaped towards B, stabbed him, and killed him. This was adjudged murder.

*Mason's case*, Fost. Cr. 132.]

[If, after an interchange of blows on equal terms, one of the parties on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon, and kills the other party with it, such killing will only be manslaughter. But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon, the killing in both these cases will be murder. The prisoner and Levy quarrelled, and went out to fight; after two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places, and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed but the prisoner, who had a clasp knife before the affray. Bayley, J., told the jury that if the prisoner used the knife privately from the beginning; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder.

*Rex v. Anderson*, O. B. 1816, MS.; Bayley, J., Richards B., and the Recorder agreed in the direction. *Russell on Cri.* 446, (2d edit.); *State v. Yarborough*, 1 Hawks, 78; *State v. Norris*, 1 Hayw. 429; *State v. Weaver*, 2 Hayw. 54.*g*

If A on a quarrel with B tell him he will not strike him, but that he will give B a pot of ale to strike him, and thereupon B strike, and A kill him, he is guilty of murder; for he shall not elude the justice of the law by such a pretence to cover his malice.

*Hawk. P. C. c. 31, § 24.*

In like manner, if B challenge A, and A refuse to meet him, but, in order to evade the law, tell B that he shall go the next day to such a town about his business; and accordingly B meet him the next day in the road to the same town, and assault him, whereupon they fight, and A kill B, he seems guilty of murder; unless it appear by the whole circumstances that he gave B such information accidentally, and not with a design to give him an opportunity of fighting.

*Hawk. P. C. c. 31, § 25; Hale's Hist. P. C. 453.*

(C) What shall be deemed Murder. (Combat.)

And at this day it seems settled, that if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in respect of his first intent.

Crompt. 22 b; Dalt. c. 93; Keil. 58, 129.

And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any words or gestures of another, so as to make a push at him with a sword, or to strike at him with any such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kills the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he showed that he intended not to fight with him, but to kill him; which violent revenge is no more excused by such a slight provocation, than if there had been none at all.

Kelyng, the Queen v. Mawbridge, Hawk. P. C. c. 31, § 27; Foxt. Cr. L. 295, 296.

But it is said, that if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him and kill him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, before he was on his guard, and in a condition to defend himself, with like hazard to both, he showed that his intent was not so much to kill as to combat with the other, in compliance with those common notions of honour, which prevailing over reason, during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense.

Keil. 33, 61, 131; Hawk. P. C. c. 31, § 28.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only, because he did it in the heat of blood.

Hawk. P. C. c. 31, § 29.

And such an indulgence is shown to the frailties of human nature, that where two persons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole (or) circumstances of the fact.

Hawk. P. C. c. 31, § 30. (a) If upon circumstances it appears, that the reconciliation was but pretended, or equivocal, and that the hurt done was upon the score of the old malice, then it is murder. Hale's Hist. P. C. 452.

[Three Scotch soldiers were drinking together in a public house; some strangers, who were sitting in the next box, used several opprobrious epithets, and reviled the character of the Scotch nation; whereupon one of the soldiers struck one of them with a small ruttan cane. An altercation ensued; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle. The altercation increased; and when the soldier had paid his reckoning, the stranger again shoved him from the room into the passage. Upon this, the soldier exclaimed, that "he did not mind killing an Englishman more than cutting a mess of crowdy." The stranger, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter.

Hale v. Taylor & Burn 1794.

(C) What shall be deemed Murder. (Combat.)

A quarrel arose between several soldiers, and a number of keelmen: one of the soldiers, to protect himself and his comrades from the assaults of the mob, drew his sword, and mistaking a person passing by for one of the keelmen, struck him on the head with his sword, of which blow he died. This was adjudged *manslaughter*.

Brown's case, Leach's Cases, 135.

A and B suddenly quarrelled: upon some provoking language B seized A by the collar: a fight ensued; they both fell to the ground; and while struggling on the ground, B received a mortal wound from a knife which A held in his hand. This also was adjudged *manslaughter*.

Snow's case, Leach's Cases, 138.]

If a man be so far provoked by a breach of promise, or by a trespass on his lands or goods, or by any words or gestures whatsoever, as thereupon immediately to push at another with a sword, or strike him with a dangerous weapon before his sword is drawn, and thereupon a fight ensue, and the person assaulted be slain, the assailant is guilty of murder, though he was driven to the wall when he gave the mortal wound; for by assaulting the other in such abusive manner, he shows that his intent was not to fight with him, but to kill him. But if he had made no pass till the other's sword had been drawn, or had only beaten him, in such manner as made it appear that he meant only to chastise him, he would have been guilty of *manslaughter* only.

Hawk. P. C. c. 31, § 33, 34, and several authorities there cited.

So, if a person, seeing two others fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other, it is but *manslaughter*.

Hawk. P. C. c. 31, § 35.

So, if two strive for the wall, and one happen to kill the other, or a man happen to kill another, who, claiming a title to his house, attempts forcibly to enter it, &c., or to kill one who endeavours unlawfully to arrest him; or to force him from his possession of a room in a public house; or, if a man immediately kills one whom he finds in bed with his wife; or that pulls him by the nose; or fillips him in the forehead, or actually strikes him; in all these cases, the party is, at most, only guilty of *manslaughter*.

Hawk. P. C. c. 31, § 36.

So, where A the son of B, and C the son of D, fall out in the field, and fight, A is beaten, and runs home to his father all bloody, B presently takes a (a) staff, runs into the fields, being three-quarters of a mile distant, and strikes C that he dies; this is not murder in B, because done in a sudden heat and passion.

13 Co. 87; Cro. Ja. 296; Hale's Hist. P. C. 453, Rowley's case. [(a) According to Croke's report, a *small cudgel*, and according to Godbolt's, a *rod*. "It may be fairly collected," saith Sir M. Foster, "from Croke's manner of speaking, [and Godbolt's report,] that the accident happened by a *single stroke*, with a cudgel *not likely to destroy*, and that death did not immediately ensue." The words of Croke are, "*Rowley struck the child with a small cudgel, of which stroke he afterwards died.*" The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore *manslaughter*. Observe that Lord Raymond (Ld. Raym. 1498) layeth great distress on this circumstance, *that the stroke was with a cudgel not likely to kill!* Post. Cr. L. 295.]

If a person in cool blood, by way of revenge, deliberately beat another in such a manner that he dies of it; or, if a man, upon a sudden provocation,

(C) What shall be deemed Murder. (*Provocation.*)

execute his revenge in such a manner as shows a cruel and deliberate intent of doing a personal hurt, he is guilty of murder; as, (a) where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail, and beat him, whereupon the horse ran away, and killed him.

Hawk. P. C. c. 31, § 38, 39. (a) Cro. Car. 131; Jon. 198, Holloway's case; Keil. 127, S. C. cited; 1 Hale's Hist. P. C. 454, S. C. cited and agreed; because the correction was excessive, and it was an act of deliberate cruelty.

||But where a person whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into a pond, in order to duck him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter.

Fray's case, 1 East, P. C. 236.]

[There being an affray in the street, one Stedman a foot-soldier ran hastily towards the combatants. A woman seeing him run in that manner cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled, and Stedman pursuing her stabbed her in the back. Holt was at first of opinion, that this was murder, *a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear*; and it was proposed to have the matter found specially. But it afterwards appearing in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter.

Fost. Cr. L. 292.

The smart of the man's wound, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact.

Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which Lutterel refused to give; and he went up stairs pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, *He did not intend to hurt the officers, but he would not be ill-used*. The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him, one stabbed him *in nine places, he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manslaughter *by reason of the first assault with the cane*.

Rex v. Tranter, 1 Str. 499. This is the case as reported by Sir John Strange; and an extraordinary case it is, that all these circumstances of aggravation, two to one, he, helpless and on the ground begging for mercy, stabbed in nine places, and then despatched with a pistol; that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. But in the printed trial, (6 Mt. Tr. 195,) there are some circumstances stated, which are entirely dropped, or very slightly mentioned, by the reporter.—1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. How that happened did not appear in evidence; for part of the affray was at a time when no witness was pre-

(C) What shall be deemed Murder. (*Provocation.*)

sent, nobody spake to the whole. 2. When Lutterel laid the pistols on the table, he declared that he brought them down, *because he would not be forced out of his lodgings.* 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot, (for both the pistols were discharged in the affray,) and slightly on the wrist by some sharp-pointed weapon: and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Lutterel's begging for mercy was not, that he was on the ground *begging for mercy*; but that on the ground he held up his hands *as if he was begging for mercy.* The Chief Justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. Lutterel gave the first blow *accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings,* which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared it could be no more than *manslaughter.* *Fost. Cr. L. 293.*] ¶Vide case of Willoughby and another, MS. 1 East, P. C. 288; Russell on Cri. 437, (2d edit.); and Rex v. Freeman, 1814, MS. Bayley, J.; Russell, 439.]] β *Pennsylvania v. Honeyman*, Addis. 149; *Pennsylvania v. Bell*, Addis. 162.g/

¶If A stands with an offensive weapon in the door-way of a room, wrongfully to prevent J S from leaving it, and others from entering; and C, who has a right in the room, struggles with him to get his weapon from him, upon which D, a comrade of A's, stabs C, it will be murder in D if C dies. A drummer and a private soldier stopped at an inn with a deserter, and were pressed by one Martin to enlist him: they gave him a shilling for that purpose, but they had no authority to enlist anybody. Martin wanted afterwards to go away, but they would not let him, and a crowd collected. The drummer drew his sword, stood in the door-way of the room where they were, and swore he would stab any one that offered to go away. The landlord, however, got by him, and the landlord's son seized his arm in which the sword was, and was wresting the sword from him, when the private who had been struggling with Martin came behind the son and stabbed him in the back. He was convicted upon the statute 43 G. 3; and it was urged for the prisoner, that the soldiers had a right to enlist Martin and to detain him, and that, if death had ensued, the offence would not have been murder; but upon the point being saved, the judges were all of a contrary opinion, and the conviction was held right.

Rex v. Longden, 1812, MS. Bayley, J.; and Russ. and Ryan, 228.

It seems that it may be laid down, as the result of the decisions, that in all cases of slight provocation, if it may be reasonably collected, from the weapon made use of, or from any other circumstance, that the party intended to kill or do some great bodily harm, such homicide will be murder, as in the instance (*ante*, 193) of the parker, who finding the boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, the boy was dragged till his shoulder was broken, of which he died; for this correction was excessive and cruel.

Halloway's Ca., Cro. Car. 131; and see Russell, 440, (2d edit.)

It must be remembered, provocation will not avail, if there be evidence of express malice. In such case, not even previous blows or struggling will extenuate homicide.

In a case where, upon a special verdict, it was found that the prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right temple, of which the child soon after died; and it was also found that the stool was of sufficient size and

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weight to give a mortal blow, but that the prisoner when she threw it did not intend to kill the deceased; the matter was considered of great difficulty, and was referred to all the judges; but no opinion was ever delivered, and a pardon was recommended. The doubt appears to have been principally on the question whether the instrument was such as would probably, at the given distance, occasion death or great bodily harm.

Hazel's Ca. 1 Leach, 368; Russell, 439, (3d ed.)]

¶ If a slave shove a white man violently so that he falls or is in danger of falling, and he rises and immediately shoots the slave, this is but manslaughter.

State v. Piner, 2 Hayw. 79.

The commission of homicide on a sudden quarrel, to avoid great bodily harm, places a man under circumstances amounting to legal provocation, and though such circumstances cannot justify or excuse the act, yet the homicide is extenuated, and is but manslaughter.

State v. Roberts, 1 Hawks, 349. See State v. Yarborough, 1 Hawks, 78; State v. Norris, 1 Hayw. 429; State v. Weaver, 2 Hayw. 54.

If a slave resist his master, previous to any attempt on the part of the latter to take his life, and he afterwards kills his master, he is guilty of murder.

State v. Will, 1 Dev. & Bat. 121.g

2. Where the Malice shall be said to be implied, or by Presumption of Law: And herein,

1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.

Herein it is laid down, that when one voluntarily kills another, without any provocation, it is murder; for the law presumes it to be malicious, and that he is *homicida humani generis*; and therefore it is necessary for him who happens to kill another, to show such a provocation as will take off the presumption of malice.

Hale's Hist. P. C. 445; 2 Pennsylvania v. Honeyman, Addis. 148; Pennsylvania v. Lewis, Addis. 263; Commonwealth v. Smith, Pamphlet report of the trial of Richard Smith, 231; Pennsylvania v. Bell, Addis. 171; Pennsylvania v. McFall, Addis. 207; Commonwealth v. Murray, 2 Ashm. 41; Commonwealth v. Gable, 7 S. & R. 422; Woodford's case, 6 Rand. 721; Dexter v. Spear, 4 Mason, 115.g

He that wilfully gives poison to another, whether he had provoked him or not, is guilty of wilful murder; because it is an act of deliberation odious in law, and presumes malice.

Hale's Hist. P. C. 435; 143 G. 3, c. 52.

¶ The law presumes all homicide to have been committed with malice notwithstanding.

State v. Eastern, 2 Hale's 220.g

If A comes to B, and demands a debt of him; or comes to serve him with a subpoena or *exemplum*, or *ad testificandum*, and B thereupon kills A, this is murder; for herein there is no provocation.

Hale's Hist. P. C. 443.

Watts came along by the shop of Brains, and distorted his mouth, and snarled at him: Brains kills him; it is murder; for it was no such provocation as would abate the presumption of malice in the party killing.

See also P.M. Brains's case: Hale's Hist. P. C. 455, cited; 2 United States v. Wilkinson, 2 Wash. C. C. R. 313.g



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If A be passing the street, and B, meeting him, there being a convenient distance between A and the wall, take the wall of A, and thereupon A kill him, this is murder. But if B had justled A, this justling had been a provocation, and would have made it manslaughter. And so it would be, if A riding on the road, B had whipped the horse of A out of the track, and then A had alighted, and killed B, it had been manslaughter.

Hale's Hist. P. C. 455, 456.

It seems agreed, that no affront by bare words or gestures, however slighting, or however false and malicious they may be, and aggravated by the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life. But if A gives indecent language to B, and B thereupon strikes A, but not mortally, and then A strikes B again, and then B kills A, this is but manslaughter; for the second stroke made a new provocation; and so it was but a sudden falling out. And though B give the first stroke, and, after a blow received from A, B gives him a mortal stroke; this is but manslaughter, according to the proverb, *The second blow makes the affray.*

Hawk. P. C. c. 31, § 33; Hale's Hist. P. C. 457.

A and B are at some difference; A bids B take a pin out the sleeve of A, intending thereby to take occasion to strike or wound B, which B doth accordingly, and then A strikes B, whereof he died; this was ruled murder; 1. Because it was no provocation, when he did it by the consent of A. 2. Because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill B.

Hale's Hist. P. C. 457.

If there be chiding between husband and wife, and the husband strike his wife thereupon with a pestle, that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter.

Hale's Hist. P. C. 457.

It is said, that if a person happen to occasion the death of another unadvisedly, doing an idle wanton action, which cannot but be attended with the manifest danger of some other, as by riding with a horse, known to be used to kick, among a multitude of people, by which he means no more than to divert himself, by putting them into a fright; he is guilty of murder.

Hawk. P. C. c. 31, § 61.

¶ If a seaman in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or bodily injury, and his situation is known to the master, be notwithstanding compelled by the master, by moral or physical force, to go aloft, who persists with brutality in such course, and the seaman falls from the mast and is drowned thereby, and his death was occasioned by the master under such circumstances, it is murder in the master.

United States v. Freeman, 4 Mason, 505.

Where a person is insane at the time he kills another, he is not punishable as a murderer, although such insanity may have been remotely occasioned by the use of spirituous liquors. But drunkenness, of itself, is no excuse.

United States v. Drew, 5 Mason, 28.

(C) What shall be deemed Murder. (*Officers of Justice.*)2. *When done on an Officer or Minister of Justice.*

It hath been adjudged, and hath frequently been agreed, that if a justice of peace, constable, watchman, &c., be killed in the execution of their offices, he, by whom any such person is killed, is guilty of murder; for herein the law implies malice; and the indictment need not be special, but general, *Ex malitia sua præcogitata interfecit et murtheravit*; because the malice in law maintains the indictment.

9 Co. 68; 4 Co. 40; Crompt. 25; 3 Inst. 52; Savil. 67; Keil. 66; Hawk. P. C. c. 31, § 48; Hale's Hist. P. C. 457.

So, if (a) a private person be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and he cannot excuse himself by alleging, that what he did was in a sudden affray, in the heat of blood, and through the violence of passion. But, if such person do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly showing his intention to be not to take part in the quarrel, but to appease it; he who kills him is guilty of manslaughter only.

Keil. 66; 11 East, P. C. 318; Hawk. P. C. c. 31, § 48. (a) Killing the assistant of the constable is as well murder as the killing of the constable himself; so those who come to the constable's assistance, though not specially called thereunto, are under the same protection, as they that are called to his assistance by name. Hale's Hist. P. C. 463.

Whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as, on arresting a person, a *capias*, &c., is guilty of murder.

Hawk. P. C. c. 31, § 55. A sheriff who has suffered a voluntary escape, having no lawful authority to arrest the prisoner on the same execution; if he attempt to do so, and he be resisted and killed, it will not be murder. *Commonwealth v. Drew et al.*, 4 Mass. 391.

Nor is it any excuse to such person, that the process was erroneous, (b) (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance,) or that the officer did not show his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one.

Hawk. P. C. c. 31, § 56. [(b) If the process, be it by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case; though there may have been error or irregularity in the proceeding previous to the issuing of the process, yet, if the officer or other minister be killed in the execution of it, this will be murder. And therefore if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without showing the judgment or decree. So ruled by Lord Hardwicke, in the case of one Rogers, at the summer assizes in Cornwall in the year 1735. *Fost. Cr. L. 311.*—In the case of a warrant from a justice of the peace, in a matter wherein he hath jurisdiction, the person executing such warrant is under the special protection of the law; though such warrant may have been obtained by gross imposition on the magistrate, and by false information touching matters suggested in it. *Curtis's case, Fost. Cr. L. 135.*—An attachment issued out of the county court, and signed by the county clerk in his own cause, is legal process; and if the officer be resisted and killed in the execution of it, it will be murder. *Baker's case, Leach's Cases, 106.*]

But, where the warrant, by which he acts, gives him no authority to arrest the party; as, (c) where a bailiff arrests J S baronet, who never

(C) What shall be deemed Murder. (*Officers of Justice.*)

was knighted, by force of a warrant to arrest J S knight, it is but manslaughter.

Hawk. P. C. c. 31, § 57. (c) So, if the name of the bailiff, plaintiff, or defendant be interlined, or inserted after the sealing thereof, by the bailiff himself, or any other; if such bailiff be killed it is but manslaughter. Hal. Hist. P. C. 457.—So, if the process be executed out of the jurisdiction of the court, the killing of the officer is only manslaughter. 1 Hal. Hist. P. C. 458.—The constable of the vill of A, comes into the vill of B, to suppress some disorder, and in the tumult the constable is killed in the vill of B, this is only manslaughter, because he had no authority in B, as constable; Hal. Hist. P. C. 459.—But it seems, that if the constable of the vill of A, had a particular precept from a justice of peace directed to him by name, or by the name of the constable of A, to suppress a riot in the vill of B, or to apprehend a person in the vill of B for some misdemeanor, and within the jurisdiction and consuance of the justice of peace, and, in pursuance of that warrant, he go to arrest the party in B, and in execution of his warrant is killed in B, this is murder; for though, in such case, the constable was not bound to execute the warrant out of his jurisdiction; neither could he do it singly, *virtute officii*, as constable of A, yet he may do it as a bailiff or minister, by virtue of the warrant, and the killing of him is murder, as well as if he had been constable of the hundred wherein A and B lie, or sheriff of the county; for a justice of the peace may, for a matter within his jurisdiction, issue his warrant to a private person as servant, but then such person must show his warrant, or signify the contents of it. Hal. Hist. P. C. 459. ¶ Killing an officer will be murder, though he have no warrant, and was not present when the felony was committed, but takes the party upon a charge only, and though that charge does not in terms specify all the particulars necessary to constitute the felony. *Rex v. Ford, Russ. & Ry. 329.*¶

¶ And so, if a bailiff attempting to execute a writ within a liberty (such writ not having a *non omittas* clause) he killed, it is not murder.

*Rex v. Mead, 2 Stark. Ca. 205.*

And so also, if the warrant to arrest is made out in blank, and the names inserted after its delivery from the sheriff's office, such warrant is illegal; and the shooting of a party attempting to execute it has been held to be only manslaughter.

*Stockley's ca., 1 East, P. C. 310, 311; Russell, 513; Housin v. Barrow, 6 Term R. 132.*

But, if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted.

*Rex v. Harris, 1801, MS.; Bayley, J., Russell on Cri. 513.* As to the manner of executing process, notice, breaking doors, &c., see *Russell, B. iii. c. iii. § 4, (2d ed.)*¶

And as to the point of notice, it is herein further laid down by my Lord Hale, that if he be a bailiff, constable, or watchman, *jures et comus*, the killing of him is murder, though the party does not know him to be such; also it is not necessary for him to notify himself to be such by express words; but it shall be presumed that the offender knew him.

*Hale's Hist. P. C. 460.*

But, if he be a private bailiff, either the party must know that he is so, or there must be some such notification thereof whereby the party may know it; as by saying, *I arrest you*, which is of itself sufficient notice; and it is at the peril of the party, if he kill him after these words, or words to that effect pronounced; for it is murder, if *de facto* it fall out that he were a bailiff, and had a warrant.

*Hale's Hist. P. C. 461.*

A constable coming to appease a sudden affray in the day-time, in the village whereof he is constable, it seems every man, *ex officio*, is bound to take notice that he is the constable, because he is to be chosen and sworn in the

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attempt or offer to arrest, another, and this latter, in his resistance, kills the aggressor, it is only manslaughter.

*Commonwealth v. Drew, 4 Mass. 391.g*

### 3. *When done by Persons in the Execution of some other unlawful Act.*

It seems agreed, that wherever a man kills another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as, where a person, shooting at tame fowl with an intent to steal them, accidentally kills a man; this is murder.

*Kelyng, 177; Dalt. c. 93; Moor, 87; Plow. 101.*  $\beta$  When a number conspire together to do an unlawful act, and death happens in the prosecution of the design, it is murder in them all. If the unlawful act be a mere trespass, the murder, to affect all, must be committed in the prosecution of the design; but if the act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design. *United States v. Roes, 1 Gallis. 524.* In New York, homicide occasioned by committing or attempting to commit a misdemeanor, is by the revised statutes reduced to manslaughter in the first degree. *The People v. Rector, 19 Wend. 569.g*

So, if A come to rob B in his house, or upon the highway, or otherwise, without any precedent intention of killing him; yet if in the attempt, either without, or upon the resistance of B, A kill B, this is murder.

*3 Inst. 52; Hal. Hist. P. C. 465.*

So, if men come to steal deer in a park or forest, or to rob a warren of conies, and the parker, forester, or warrener resists, and is killed, this is murder.

*Hal. Hist. P. C. 465.*

|| If a court-martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder.

*Per Heath, J., 4 Taunt. 77.*

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats, had ammunition given to him when he was put upon guard, and acted on the mistaken impression that it was his duty. The prisoner was sentinel on board the *Achille* when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed, upon which he called repeatedly to them to keep off; but one of them persisted, and came close under the ship, and he then fired at a man who was in the boat, and killed him. It was put to the jury to find whether the sentinel did not fire under the mistaken impression that it was his duty; and they found that he did. But a case being reserved, the judges were unanimous that it was murder. They thought it, however, a proper case for a pardon; and, further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.

*Rex v. Thomas, MS. Bayley, J., Russ. on Cri. 510.*

In a case where there had been mutual blows, and then, upon one of the parties being pushed down upon the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was consi-

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deemed only to be manslaughter. The deceased, who was a French prisoner, had stolen a tobacco-box from one of the party of French prisoners who were gambling, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner, who was sitting at a table, and much intoxicated, the prisoner got up, and with much force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his double fist in the face, and one blow in the eye; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay upon his back on the ground, two or three stamps with great force with his right foot on the stomach and belly, and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick on the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by heat of blood: but the learned judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the judges were of opinion that it was only a case of manslaughter.

*Rex v. Ayes*, 1810, MS. Bayley, J.; and *Russ. & Ry.* 166.]

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also, where it any way occasionally causes such a misfortune, it makes him guilty of murder. And such was the case of the husband, who gave a poisoned apple to his wife, who ate not enough to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof. Such also was the case of the wife, who mixed ratsbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as a murderous intention, which, of itself, perhaps, in strictness, might justly be punished with death, proves now, in the event, the cause of the king's losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power.

*Flow.* 475; 9 Co. 81; *Hawk. P. C. c.* 31, § 42.

So, where one gave medicine to a woman to procure abortion, and where a man put skewers into the womb of a woman for the same purpose, and the women died in both cases, these acts were held murder: for though the original intent was only a great misdemeanor, yet the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the women on whom they were practised.

*Tuckler's case*, 1 East, P. C. 230.]

So, if A, by malice forethought, strikes at B, and missing him strikes C, whereof he dies; though he never bore any malice to C, yet it is murder, and the law transfers the malice to the party slain.

*Hall. Hist. P. C.* 406.

If diverse persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as, by committing a violent disseisin with

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great numbers of people, hunting in a park, &c., and in so doing happen to kill a man, they are all guilty of murder; for they must, at their peril, abide the event of their actions, who wilfully engage in such bold disturbances of the public peace in open opposition to, and defiance of, the justice of the nation.

Savil, 67; Moore, 86; Palm. 35; Crom. 24; Dyer, 128; 5 Mod. 289; Hawk. P. C. c. 31, § 46.

Yet, where divers rioters, having forcibly got possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, (says Hawkins,) because the person slain was so much in fault himself.

Crom. 28; Hawk. P. C. c. 31, § 47.

But, if in such case, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for though it was not his primary intention to commit a felony, yet, inasmuch as he persists in a less offence with so much obstinacy, as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony.

Hawk. P. C. c. 31, § 48.

If A throw a stone with an intent to kill the poultry or cattle of B, and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful; but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.

1 Hal. Hist. P. C. 475.

And though by the statute 33 H. 8, c. 6, no person not having lands, &c., of the yearly value of 100*l. per ann.* may keep, or shoot a gun, upon pain of forfeiting 10*l.*, yet, if a person not qualified shoots with a gun at a bird or at crows, and by mischance it kills a by-stander, by the breaking of the gun, or some other accident that, in another case, would have amounted only to chance-medley; this will be no more than chance-medley in him; for though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature.

1 Hal. Hist. P. C. 475.

||But where the prisoner killed his opponent in a boxing match it was holden manslaughter, though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was urged to engage by taunts, and the occasion was sudden.

Ward's case, 1 East, P. C. 270. ||

If a man, knowing that people are passing along the street, throws a stone, or shoots an arrow over the house or wall, with an intent to do hurt to people, and one is thereby slain, this is murder; and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful. But if the man were tiling an house, and let fall a tile know-

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ingly, and gave warning, and yet a person be killed, this is *per infortunium*; but if he gave not convenient warning, it is manslaughter, *quia non adhibuit debitam diligentiam*.(a)

Hal. Hist. P. C. 475. (a) This is upon supposition, that the house do not stand near an highway or place of resort, for then though he should cry out first, it is manslaughter. See Hull's case, 1664, Kel. 40.

||It is no excuse for killing a man that he was out at night, as a ghost dressed in white for the purpose of alarming the neighbourhood, even though he could not otherwise be taken. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost: the prisoner went out with a loaded gun to take the ghost, and upon meeting with a person dressed in white, immediately shot him. M'Donald, C. B., Rooke and Lawrence, Js., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor, and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the court said they could not receive that verdict, and told the jury if they believed the evidence, they must find the prisoner guilty of murder, and that if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced; but the prisoner was afterwards reprieved.

Rex v. Smith, 1804, MS.; Bayley, J., Russ. on Cri. 459.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter; though he called to the deceased to get out of the way, and the deceased might have done so if he had not been drunk.

Rex v. Walker, 1 Carr. & B. 320. And see as to furious driving, 1 G. 4, c. 4. ||

#### β4. Mala praxis.

There are three kinds of mal-practice. 1. Wilful mal-practice, which takes place when a physician purposely administers medicines or performs an operation which he knows and expects will result in danger or death to the individual under his care, as if he administer medicine to produce abortion. 2. Negligent mal-practice, as if a physician should, while in a state of intoxication, administer medicines to his patient which are known to be injurious in such a case. 3. Ignorant mal-practice, which is the ignorant administration of medicine calculated to do injury, and which a man learned in his profession would not administer.

If one assuming the character of a physician, through ignorance, administers medicine to his patient, with an honest intention and expectation of a cure, which causes the death of the patient, he is not guilty of felonious homicide.

Commonwealth v. Thompson, 6 Mass. 134.

An ignorant and unskilful person, in delivering a woman, gave the child a wound on the head, as soon as the head became visible, of which the child died immediately after birth, it having been born alive; held, that he was rightly convicted of manslaughter.

Rex v. Senior, Mood. C. C. R. 346.

If a medical man, though qualified to practise as such, cause the death of a patient by the grossly unskilful or grossly incautious use of a dangerous instrument, he is guilty of manslaughter.

Reg. v. Spilling, 2 M. & Rob. 107. g



(D) Of Manslaughter: And herein, of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1, c. 8.

**MANSLAUGHTER**, or simple homicide, (a) is the voluntary killing of another without malice express or implied, and differs not, in substance of the fact, from murder, but only differs in these ensuing circumstances.

Hal. Hist. P. C. 466. (a) By manslaughter is understood such killing as happens either on a sudden quarrel, or in the commission of any unlawful act, without any deliberate intention of doing mischief. Hawk. P. C. c. 30, § 1. β It is not necessary to give evidence of a positive intent to kill, to constitute voluntary manslaughter. Commonwealth v. Gable, 7 S. & R. 428. See Pennsylvania v. Robertson, Addis. 248.γ

1. In the degree of the offence, murder being aggravated with malice presumed or implied, but manslaughter not; and therefore in manslaughter there can be no accessories before. 2. In the form of the indictment, the former being always *felonice ex malitia præcogitata interfecit et murdravit*, the latter only *felonice interfecit*. 3. In the point of clergy, (b) murder being by the statute of 23 H. 8, c. 1, exempt from the benefit of clergy, but not manslaughter. 4. In the form of the pardon of murder; for though at common law a pardon of all felonies had pardoned murder, yet, by the statute of 13 Rich. 2, c. 1, the pardon of murder must either be by the express word of *murder*, or it must be a pardon of *felonice interfectio*, with a special *non obstante* of the statute of 13 Rich. 2.

Hal. Hist. P. C. 466, 467. [(b) The punishment of murder, and that of manslaughter, were originally one and the same; both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now, by several statutes, 23 H. 8, c. 1; 1 Edw. 6, c. 12, 4 & 5 P. & M. c. 4, the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. It is also enacted by stat. 25 G. 2, c. 37, that the judge before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall, in passing sentence, direct him to be executed the next day but one, (unless the same shall be Sunday, and then on the Monday following,) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And during the short, but awful, interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause to respite the execution, and relax the other restraints of this act. 4 Bl. Comm. 200; Fost. 107, 141.] [By 7 Geo. 4, c. 28, § 6, benefit of clergy is abolished altogether.]]

But there is a particular kind of manslaughter from which the benefit of clergy is taken away by the (c) 1 Jac. 1, c. 8, "Where any person shall stab or thrust any person or persons, that hath not then any weapon drawn, or that hath not then first stricken the party that shall so stab or thrust, so as the person or persons, so stabbed or thrust, shall thereof die within the space of six months then next following; although it cannot be proved that the same was done of malice forethought, the offender is ousted of clergy, provided it shall not extend to him that kills *se defendendo*, or by misfortune, or in preserving the peace, or chastising his child or servant."

[This statute was made at a critical time, and, as tradition hath it, upon a very special occasion. It is supposed to have been principally intended to put an effectual stop to outrages then frequently committed by persons of inflammable spirits and deep resentment; who, wearing short daggers under their clothes, were too well prepared to do quick and effectual execution upon provocation extremely slight. Fost. Cr. Law, 2, 7.] (c) It is generally holden, that this statute is but declarative of the common law. Buls. 87; Kelyng, 55; Hawk. P. C. c. 30, § 5. ["Whether it was merely a declaratory law," saith Sir M. Foster, "I will not take upon me to determine. But certain it is, that though the words descriptive of the offence are very general, probably *in terrorem*, yet in the construction of the statute the circumstances which at common law will serve

## (D) Of Manslaughter.

to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded on the statute." Fost. Cr. Law, 298.]

In the construction of this statute, the following opinions have been holden:—

That wherever a person, who happens to kill another, was struck by him in the quarrel before he gave the mortal wound, he is out of the statute, though he himself gave the first blow.

Jon. 240; 3 Lev. 266; Hawk. P. C. c. 30, § 6.

That he only who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present and aiding and abetting the fact, are within the statute; from whence it follows, that if it cannot be proved by whom the stroke was given, none can be found guilty within the statute. But the indictment, though formed specially upon the statute, and concluding *contra formam stat.*, is yet a good indictment of manslaughter against them that were present aiding and abetting; and upon such a special indictment of manslaughter upon the statute, the prisoner may be convicted of simple manslaughter, and acquitted of manslaughter upon the statute, and the indictment serves for a common manslaughter, as well as a man upon an indictment of murder may be acquitted of murder, and convicted of manslaughter.

Allen, 44; Salk. 542, pl. 2; Hawk. P. C. c. 30, § 7; Hal. Hist. P. C. 468.

That the killing of a man with a (a) hammer, or such like instrument, which cannot come properly under the words *thrust* or *stab*, is not a killing within the statute. But it seems that the discharging a (b) pistol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words *having a weapon drawn*; for penal statutes are construed strictly, and favourably, and equitably for the subject.

Jon. 439; 3 Lev. 266; Hawk. P. C. c. 30, § 7. (a) If the stabbing or thrusting were with a sword or with a pike-staff, it is within the statute; but if by a shot of a pistol, blow with a sword or staff, *quære*. Hal. Hist. P. C. 470. (b) So, if the party slain had a cudgel in his hand, it is a weapon drawn, within this statute; but this must be intended of such a cudgel as might probably do hurt, not a small riding rod or cane. Hal. Hist. P. C. 470.

The indictment to oust the prisoner of his clergy must be specially formed pursuant to the statute, viz.: that he did with a sword, &c., stab the party dead; he having no weapon drawn, nor having struck first; otherwise it will be but a common manslaughter, and the party will have his clergy.

Hal. Hist. P. C. 463.

The indictment need not conclude *contra formam statuti*, no more than in burglary or robbery; for the statute doth not make the offence to be felony, but ousts the prisoner of his clergy, where the crime is so circumstanced as the statute expresseth.

Styl. 86; Hal. Hist. P. C. 468.

But yet it doth not vitiate the indictment, though it do conclude *et sic interfecit contra formam statuti*, and accordingly, for the most part, to this day the indictments upon this statute do conclude *contra formam statuti*. So, it is good with or without such conclusion; but it is best to follow the common usage, because every man doth not readily observe the reason of the omission of that conclusion.

Cro. Ja. 283; Hal. Hist. P. C. 468.

Also, the use hath been, in cases of this nature, to prefer two indictments

(E) Of Justifiable Homicide.

against offenders in this kind, viz. : one of murder, another upon this statute, and put the prisoner to plead to both ; and to charge the jury first with the indictment of murder ; and if they find it not to be murder, then to charge them to inquire upon the other bill ; because, if convict upon either, the offender is ousted of clergy.

Hal. Hist. P. C. 468.

In the year 1567, at Newgate, before Glyn, who then sat as Chief Justice, a man was indicted upon this statute, and a special verdict found, that a bailiff, having a warrant to arrest a man, pressed early into his chamber, with violence, but not mentioning his business. The man not knowing him to be a bailiff, or that he came to make an arrest, snatched down a sword that hung in his chamber, and stabbed the bailiff, whereof he presently died. There was some diversity of opinion among the judges, whether this were within the statute : but at length the prisoner was admitted to his clergy ; for though this case was within the words of the statute, and not within the particular exceptions, yet it was held, that this case was never intended in the statute ; for the prisoner did not know but that the party came in to rob or kill him, when he thus violently broke into his chamber, without declaring his business.

Hal. Hist. P. C. 470.

[Upon an outcry of thieves in the night-time, a person, who was concealed in the closet, but no thief, was, in the hurry and surprise the family was under, stabbed in the dark. This was holden to be an innocent mistake, and ruled chance-medley. Possibly, observes Sir M. Foster, it might have been better ruled manslaughter at common law, due circumspection not having been used ; but it was not manslaughter within the statute.

1 Hale, 42, 474 ; Cro. Car. 538 ; Sir Wm. Jones, 429 ; Fost. Cr. Law, 299.]

¶ A seeks B and threatens his life, they meet, a quarrel ensues, B strikes A with his fist, they separate, A attempts to arm himself with a stick, which he is unable to do, again stoops to raise another stick of a dangerous kind ; while stooping B stabs him ; held, that this was not murder, but manslaughter.

Allen v. The State, 5 Yerg. 453.

¶ By 3 Geo. 4, c. 38, it is enacted, " That any person convicted of manslaughter shall not be burned in the hand, but shall be liable to be transported for life, or for any term of years as the court shall adjudge ; or to be imprisoned only, or imprisoned and kept to hard labour for any term not exceeding three years, or to a pecuniary fine in the discretion of the court ; and that the punishment in pursuance of this act shall have the same effects and consequences as burning in the hand."

(As to the law upon the statute 43 Geo. 3, c. 58, against shooting, stabbing, &c., with intent to maim, (now repealed, but, in substance, re-enacted by 9 Geo. 4, c. 31,) see *antè*, tit. MAIHEM, vol. vi.)

(E) Of justifiable Homicide : And herein,

1. *As it happens in the due Execution and Advancement of public Justice*

SUCH killing as happens in the due execution and advancement of public justice is deemed justifiable homicide ; the ministers of justice being under the special protection of the law ; and therefore, if a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his

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own(a) defence, or fly, so that *he cannot possibly be apprehended alive* by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.

22 Ass. 55; Bro. *Coron.* 87, 89; Stamf. 13; 3 Inst. 221; Dalt. c. 98; Cromp. 30; Fitz. *Coron.* 192, 258; Hale's Hist. P. C. 489; Hawk. P. C. c. 28, § 11. ¶ Vide East, P. C. 303. (a) But, if the prisoner makes no resistance, but flies, and the officer, being fearful lest the prisoner should escape, strikes him, whereof he dies, this is murder. Hale's Hist. P. C. 481. For here was no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.

So, if an innocent person be indicted of felony, where, in truth, no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose; he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him on record, to which, at his peril, he is bound to answer.

Hawk. P. C. c. 28, § 12.

So, if a prisoner, endeavouring to break the jail, assault his jailer, he may lawfully be killed by him in the affray.

9 Co. 68; Hal. Hist. P. C. 481. ¶ In 2 Bos. & Pul. 265, Chambre, J., said, it was lawful for a private person to do any thing to prevent the perpetration of a felony.¶

So, if those who are engaged in a riot, or forcible entry, or detainer, stand in their defence, and continue the force, in opposition to the command of a justice of peace, &c., or resist such justice endeavouring to arrest them, the killing of them may be justified; and so, perhaps, may the killing of dangerous rioters by any private person, who cannot otherwise suppress them, or defend himself from them; inasmuch as every private person seems to be authorized by the law to arm himself for the purposes aforesaid.

Hawk. P. C. c. 28, § 14; Poph. 121.

¶ Sheriffs' officers having apprehended a man by virtue of a writ against him, a mob endeavoured to rescue the prisoner. In the course of the scuffle, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and, as it was thought, had killed her; whereupon, and before her recovery was ascertained, the constable was sent for and charged with the custody of the bailiff who had struck the woman. The bailiffs gave the constable notice of their authority, and represented the violence which had been previously offered to them, notwithstanding which he proceeded to take them into custody upon the charge of murder, and offered to take care also of their prisoner; but the latter was soon rescued by the mob. The woman having recovered, the bailiffs were released by the constable the next morning. On an indictment for an assault and rescue, Heath, J., was clearly of opinion that the constable and his assistants were guilty, and so directed the jury.

Anon., 1 East, P. C. 305; and vide 1 Hale, 460.¶

So, if trespassers in a forest, chase, park, or warren, or any enclosed ground, wherein deer are kept, will not render themselves to the keepers, upon an hue and cry made to stand to the king's peace, but fly from, or defend themselves against them; they may be slain, by force of the statute *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10.

Cromp. 30; Dyer, 326; Hawk. P. C. c. 28, § 15.

If either of the parties fighting in a combat, allowed by law for the trial of some special cases, be slain, he who kills him is justified; and the death of the other is imputed to the just judgment of God, who is presumed to give the victory to him who fights in the maintenance of truth.

Plow. 9 b; Dalt. c. 98; 3 Inst. 221; 37 H. 6, 21 a.

## (E) Of justifiable Homicide.

If a sheriff, being resisted by one whom he attempts lawfully to arrest in a civil action, or to retake after he has arrested him, unavoidably kill him in the affray, he may justify it; though he never gave back, but stood his ground, and attacked the party. But if a person barely fly from the execution of (a) civil process, the sheriff cannot justify killing him.

Roll. Rep. 189; 3 Inst. 56; Crompt. 24; Dalt. c. 98; Hawk. P. C. c. 28, § 17. (a) Herein, says my Lord Hale, the difference is between civil actions and felonies; that if a man be in danger of arrest by a *capias* in debt or trespass, and he fly, and the bailiff kill him, it is murder; but if a felon fly, and he cannot be otherwise taken, if he be killed, it is no felony; and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods. Hale's Hist. P. C. 481; *sed vide* Foster, 271.]

Homicide may be justified in the due execution of public justice; but herein those rules must be observed:—

1. That the judgment, by virtue whereof the party was put to death, be given by one who had jurisdiction in the cause; for otherwise both judge and officer may be guilty of felony; as, if the Court of Common Pleas give judgment on an appeal of death, or justices of peace on an indictment of high treason, and award execution, which is executed. But if justices of peace condemn a man to death on an indictment of trespass, and he be executed, they only, and not the officers, are guilty of felony; because they had a jurisdiction over the offence, and therefore their proceedings are erroneous only, and not void.

10 Co. 76; Dalt. c. 98; 22 E. 4, 33 a; Hawk. P. C. c. 28, § 4. *¶* Vide 8 Term R. 455.]

A man hath the liberty of *Infangthef*, the steward of the court gives judgment of death against a prisoner against law: this was a cause of seizure of the liberty, but was not murder in the judge, *quia factum judicialiter licet ignoranter*, 2 R. 3, 10 a. The case of the steward of the liberty of the Abbot of Crowland.

Hal. Hist. P. C. 454.

The judgment must be executed by the lawful officer; for those ancient opinions, that any one may kill a person attainted of felony, and that a man condemned in an appeal of death is to be executed by the relations of the deceased, are now obsolete: and at this day, even the judge who condemns a man cannot execute his own sentence; neither can the proper officer do it, but by a lawful command, without being guilty of felony.

Hawk. P. C. c. 28, § 7, 8, 9; Hal. Hist. P. C. 455.

The execution must pursue the judgment; therefore if the sheriff behead a man, where beheading is no part of the sentence, it is the general opinion that he is guilty of felony.

Hawk. P. C. c. 28, § 10; Hal. Hist. P. C. 433, S. P. Because an act of deliberate cruelty.

*¶* If a court-martial order a man to be flogged, where they have no jurisdiction, and the flogging kills the man, the members who concurred in the order are guilty of murder.

*Per* Heath, J., 4 Taunt. 77.]

2. *As it happens in the Defence of a Man's Person, House, or Goods.*

It is clear, that the killing of a person in the defence of a man's person, house, or goods, is justifiable in the following instances:—As, where a man kills one who assaults him in the highway to rob or murder\* him; or the owner of a house, or any of his servants, or lodgers, &c., kills one who at-

## (E) Of justifiable Homicide.

tempts to burn it, or to commit in it murder, robbery, or other felony; or a woman kills one who attempts to ravish her; or a (a) servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately, and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself. But in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him.

Hawk. P. C. c. 28, § 21, and several authorities there cited. Hal. Hist. P. C. 484. ¶ Homicide is justifiable in defence of one's person or property only when the intent of the person killed was to commit a felony, for no gestures or intent to commit a trespass will justify a killing. United States v. Wiltberger, 2 Wash. C. C. R. 515; Commonwealth v. Drew et al., 4 Mass. 391; State v. Tackett, 1 Hawkes, 210; State v. Zellers, 220; State v. Wells, 1 Cox's R. 424. § (a) So, of a husband in defence of his wife, a child of his parent, *et c. converso*; for the act of the assistant shall have the same construction, in such cases, as the act of the party assisted should have had, if it had been done by himself. Hal. Hist. P. C. 484.—\* By 24 H. 8. c. 5, it is no forfeiture for killing a man attempting to commit murder or robbery.

But a man cannot justify the killing another in defence of his house or goods, or even of his person, for a bare private trespass; and therefore he who kills another, who claiming title to his house attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges, after he has forbidden, is guilty of manslaughter; and he, who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of homicide *se defendendo*, for which he forfeits his goods, but is pardoned of course; yet it seems, that a private person, and, *a fortiori*, an officer of justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress, dangerous rioters, may justify the fact, inasmuch as he only does his duty, in aid of the public justice.

Hawk. P. C. c. 28, § 23; Hal. Hist. P. C. 485.

If a man be dangerously assaulted by another, as with a drawn sword, &c., without any previous affray, though in a town, or other place where help may be expected, and use the same caution to avoid fighting as would make the killing the assailant homicide *se defendendo* only, if there had been a previous affray, and then unavoidably kill the assailant, it seems reasonable that he may justify it.

Hawk. P. C. c. 28.

It seems also, that in some special cases, a man may justify even killing an innocent person; as, where in a shipwreck two persons get upon the same plank, which will not support them both, and one thrusts the other off.

Dalt. c. 98.

So, if a man be awakened in the night with an alarm that thieves are in his house, and searching for them in the dark, with his sword drawn, happen to kill a person lying hid in part of the house, who in truth had no ill design, and was brought hither by a servant in order to assist in cleaning the house; it seems, he may justify the fact, inasmuch as it hath not the appearance of a fault.

Cro. Car. 438, March 5. Vide *suprà*.

But a man shall never justify himself under a necessity which he brought upon himself by his own fault; and therefore, if rioters, wrongfully detaining

## (F) Of excusable Homicide.

a house by force, kill the party ejected, or any of his assistants who attack it from without and endeavour to burn it, they are guilty of manslaughter.

Hawk. P. C. c. 28, § 2.

[The prisoner was indicted for the murder of his brother, and the case upon evidence appeared to be, that the prisoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refused to do; whereupon a scuffle happened betwixt the father and the son. The deceased, who was then in bed, hearing the disturbance, got up, and fell upon the prisoner, threw him down, and beat him upon the ground, and there kept him down so that he could not escape, nor avoid the blows; and as they were so striving together, the prisoner gave the deceased a wound with a penknife, of which wound he died. The judges present (a) doubted, whether this were manslaughter or *se defendendo*, and a special verdict was found to the effect here set forth. At a conference of all the judges of England, it was unanimously holden to be manslaughter; for there did not appear to be *any inevitable necessity so as to excuse the killing in this manner*.

Vailor's case, Foat. Cr. Law, 278. *See* Grainger v. State, 5 Yerg. 459. *g* (a) Holt, Tracey, and Bury.]

It seems a reasonable opinion, and countenanced by the old books, that a fact amounting to *justifiable* homicide, being specially (b) pleaded, and proved to the court on an indictment or appeal of murder, the party shall be dismissed without being arraigned, &c. But it is certain that a fact amounting to *excusable* homicide cannot be so pleaded; but the party must plead not guilty, and give the special matter in evidence: also, it is certain, that where a fact amounting to *justifiable* homicide is found by a jury, the party is to be dismissed, without being obliged to purchase a pardon, &c.

Hawk. P. C. c. 28, § 3. (b) But herein my Lord Hale says, it is generally to be observed, that in case of any indictment or charge of felony, the prisoner cannot plead any thing by way of justification, as that he did it in his own defence, or *per infortunium*, but must plead not guilty; and, upon his trial the special matter is to be found by the jury, and thereupon the court gives judgment. Hal. Hist. P. C. 478.

¶ If a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter nor murder, but self-defence.

Grainger v. The State, 5 Yerg. 459. *g*

## (F) Of excusable Homicide: And herein,

## 1. Of Homicide per Infortunium, or Chance-medley.

EXCUSABLE or involuntary homicide is of two kinds. 1st, When it is purely involuntary and casual; as the killing of a man *per infortunium*. 2dly, When it is partly involuntary, and partly voluntary, but occasioned by a necessity which the law allows, which is commonly called homicide *ex necessitate*; as killing a man in one's own defence.

Hal. Hist. P. C. 471.

Homicide *per infortunium* is where a man is doing a lawful act, and without intention of bodily harm to any person, and by that act death of another ensues; as, if a man be shooting at butts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander.

Hal. Hist. P. C. 472.

## MURDER AND HOMICIDE.

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And though the killing of another *per infortunium* be not in truth felony, nor subject the party to a capital punishment: and therefore, in such cases the verdict usually conclude *quodd interfecit per infortunium et non per feloniam*; yet the party forfeits his goods; and though he ought to have, *quasi de jure*, a pardon of course, upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed to the next term or sessions, to sue out his pardon of course; for though it was not his crime, but his misfortune, yet, because the king hath lost a subject, and that men may be the more careful, he forfeits his goods; and is not presently absolutely discharged of his imprisonment, but bailed.

Hal. Hist. P. C. 477.

Also, it is agreed, that no one can excuse the killing of another by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead not guilty, and give the special matter in evidence.

Hawk. P. C. c. 29, § 24.

As, where, without any intent of doing hurt, a person chanceth to kill another by the head of a hatchet flying off at work; this being proved in evidence, the party is guilty of homicide *per infortunium* only.

Hal. Hist. P. C. 472.

So, where a person happens to kill another by a piece of timber flung down from a house standing out of any road, after loud warning to all persons to stand clear; or by a gun discharged at wild-fowl; or by an unlucky fall or kick at wrestling or football, or other suchlike sports; or in fighting at barriers; or tilting by the king's command; or by moderate correction of a child, scholar or servant. But if the correction be immoderate, the offence will be manslaughter at least; and if the instrument be such as apparently endangers life, as, an iron bar, &c., it will be murder.

Hal. Hist. P. C. 473; Hawk. P. C. c. 29.

So, if a man whip a horse on which another is riding, whereupon he springs out and runs over a child, and kills him, the rider is guilty of homicide *per infortunium*, the other of manslaughter.

Hawk. P. C. c. 29.

But, regularly, if the act which occasions the death of a man be a trespass, or cannot but be attended with the manifest danger of hurt to the person of some man, or be of such a nature that it cannot be used without manifest hazard of life, and there were no deliberate intent of mischief, the killing is esteemed manslaughter; as, if a man kill another by shooting at deer in a third person's park; or by flinging down a piece of timber into a common street or highway, though in work, and after warning to stand clear; or by throwing stones at another wantonly at play; or by tilting without the king's command; or by parrying with naked swords covered with buttons at the points, or with swords in the scabbards.

Hal. Hist. P. C. 473, &c.; Hawk. P. C. c. 29. [The prisoner came to town in a chaise, and before he got out of it, he fired his pistols, which by accident killed a woman. King, C. J., ruled it to be manslaughter. Rex v. Barton, 1 Stra. 481.]

But, if a man in the execution of a deliberate purpose to commit a felony, or to do a personal hurt to another, or to do any unlawful act, which cannot but manifestly be attended with danger of great personal hurt to some other, happen to kill another, though it be not intended against any one in particular, he is guilty of murder; as, where a man kills another by maliciously beating or wounding him; or by shooting at tame fowl, with an intent to



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steal them ; or by knowingly and deliberately discharging a gun ; or throwing a great stone or piece of timber ; or riding with a horse, used to strike, among a multitude, though he do it only with an intent to divert himself by frightening them ; or by engaging in a riot ; or robbing in a park, &c.

Hawk. P. C. c. 29 ; Hal. Hist. P. C. 475.

[By stat. 10 Geo. 2, c. 31, if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.]

A man at the diversion of cock-throwing at Shrovetide missed his aim, and a child looking on received a blow from the staff, of which he soon died ; this was ruled manslaughter.

Fost. Cr. Law, 261.

2. Of Homicide *se Defendendo*.

Homicide (a) *se defendendo* is where one is forced to fight on a sudden affray, retreats as far as he can without endangering his own life, and then, and not before, in order to save his life, or to defend his person from a battery, (especially if the assault were in his own house,) gives the other a mortal wound. It is said by some not to be material who struck first. But, if a man attack another upon malice, in such a manner as endangers his life, and then fly to the wall, and kill him, he is guilty of murder.

Hawk. P. C. c. 29, § 13. (a) In homicide *se defendendo* there seems necessary some act to be done by the party killing ; for if he be merely passive, this will make it only a killing *per infortunium* ; and though it be not felony, not being accompanied with a felonious intent, yet it subjects the party to a forfeiture of his goods and chattels. Hal. Hist. P. C. 478, &c.

Regularly, it is necessary that the person, who kills another in his own defence, fly as far as he may to avoid the violence of the assault, before he turn upon his assailant ; for though, in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour ; because the king and his laws are to be the *vindices injuriarum* ; and private persons are not trusted to take capital revenge one of another.

Hal. Hist. P. C. 481.

There is malice between A and B, they appoint a time and place to fight, and meet accordingly ; A gives the first onset, B retreats as far as he can with safety, and then kills A, who had otherwise killed him ; this is murder ; for they met by compact and design, and therefore neither shall have the advantage of what they themselves created.

Hal. Hist. P. C. 479.

There is malice between A and B, they meet casually, A assaults B and drives him to the wall, B in his own defence kills A ; this is *se defendendo*, and shall not be heightened by the former malice into murder ; for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of A.

Hal. Hist. P. C. 479.

In Fleet-street A and B were walking together, B gave some provoking language to A, A thereupon gave B a box on the ear, they closed, B was

(A) Nature of Nonsuit and *Retrazit*.

thrown down and his arm broken, he runs to his brother's house presently, which was hard by, C, his brother, taking the alarm, came out with his sword drawn and made towards A, who retreated ten or twelve yards, C pursued him, A drew his sword and made a pass at C and killed him; A being indicted at Newgate sessions for murder, the court directed the jury upon the trial to find this manslaughter, not murder; because upon a sudden falling-out; not *se defendendo*, partly because A made the first breach of the peace, by striking B, and partly because, unless he had fled as far as might be, it could not, by way of interpretation, be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger; and his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C than to avoid him. And accordingly at last it was found manslaughter, 1671, at Newgate.

Hal. Hist. P. C. 483.

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## NONSUIT.

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[See Tidd's Practice, 917, *et seq.* (8th ed.)]

- (A) Of the Nature thereof, and how it differs from a *Retrazit*.
  - (B) Who may be Nonsuit.
  - (C) In what Actions there may be a Nonsuit.
  - (D) At what Time a Nonsuit may be.
  - (E) How far the Nonsuit of one shall be the Nonsuit of another.
  - (F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole.
  - (G) Of the Effect of a Nonsuit: And herein of its being a peremptory Bar.
  - (H) Of setting aside a Nonsuit.
- 

(A) Of the Nature thereof, and how it differs from a *Retrazit*.

WHERE a plaintiff is demanded and doth not appear, he is said to be nonsuit. And this usually happens, where, upon the trial, and when the jury are ready to give their verdict, the plaintiff discovers some error or defect in the proceedings, or is unable to prove a material point, for want of necessary witness, &c., and thereupon being demanded, (as he must be) his default is recorded by the secondary. And the entry (*a*) is in *miser cordia quia non prosecutus est breve suum*; upon which the defendant recovers his costs against him. But this arising from some supposed neglect or oversight, the plaintiff, except in some particular cases, is not (*b*) barred from commencing a new action.

Co. Lit. 139 a; 2 Lil. Reg. 230. (*a*) For the form of the entry, vide Cro. Ja. 913; 2 Leon. 177; 2 Salk. 456, pl. 6. (*b*) That where a plaintiff is nonsuit, if he will again proceed in the same cause, he must put in a new declaration; for by his being nonsuit,

(A) Nature of Nonsuit and *Retrazit*.

it shall be intended that he had no such cause of suit as he declared in, and so that declaration is void, and he hath no day in court. 1 Lil. Reg. 231.—But a nonsuit by mistake may be set aside, and a *distringas de novo* awarded, for which vide Cro. Car. 203; Cro. Ja. 669; Godb. 328; Raym. 38, 73; 2 Salk. 455.—A motion to set aside a nonsuit occasioned by the judge's mistaking the law. Ca. Law and Eq. 315.—Nonsuit discharged, being entered on *nisi prius* without *habeas corpus*. Sid. 164.—\* A plaintiff sometimes submits to be nonsuited where the opinion of the judge is against him, the judge giving him leave to move the court to set the nonsuit aside, without costs.—If the judge does not give such leave, but directs a nonsuit, the plaintiff, if he conceives the judge mistaken in the law, may move to set the nonsuit aside; and if the court is of opinion the judge was mistaken, will set same aside, and generally without costs. In some particular cases, however, there may be reasons sufficient to induce the court to refuse to set aside the nonsuit, unless the plaintiff will pay costs. ¶ And if an objection is taken by defendant at the trial, and the judge overrules it without reserving the point, and the court are afterwards of opinion that the objection was a good ground of nonsuit, they will only grant a *new trial*, and will not permit a nonsuit to be entered. Minchin v. Clement, 1 Barn. & A. 253.¶—If there are several defendants, and all found guilty, plaintiff may enter a *nolle prosequi* against any one; therefore, if in trover against a defendant executor, and other defendants not executors, there is a verdict against these, and the executors found not guilty, judgment shall not be arrested, for plaintiff may enter *nolle prosequi* as to him. Dale v. Eyre, T. 24 & 25 Geo. 2, 1 Wils. 306. {The court cannot compel a plaintiff to submit to a nonsuit. They may advise it, and direct him to be called; but if he refuse to suffer a nonsuit, the court can no otherwise protect and enforce their opinion but by awarding a new trial, if the jury find against their direction. Consequently a refusal by the court to direct a nonsuit is no ground for a bill of exceptions. 1 Wash. 87, Roes v. Gill; *ibid*. 138, Thornton v. Jett; 2 Bin. 234, Girard v. Gettig; *ibid*. 248, Widdifield v. Widdifield.}

A *retrazit* is, when the plaintiff is present in court (as regularly he is ever by intendment of law, till a day be given over, unless it be when a verdict is given, and then he is but demandable;) and this is either privative, when the entry is *quodd solemniter exactus non venit, sed a sectâ suâ in contemptum curiæ se retrazit*, &c., or positive, when the entry is *quodd fatetur se, seu cognoscit se ulterius nolle prosequi*, &c. It is called a *retrazit*, because that is the effectual word used in the entry, and is (a) a bar to all actions of the like or inferior nature.

Co. Lit. 139 a. β When the plaintiff voluntarily goes into court and enters on the record that he is nonsuit, it is not a nonsuit but a *retrazit*. Worke v. Byers, 3 Hawks, 228.g (a) 8 Co. 58, 52, S. P.; laid down as a rule, 4 Mod. 87, S. P.

A *retrazit* is always of the part of the plaintiff or demandant, and cannot be, unless the plaintiff or demandant be in court in proper person. (b)

9 Co. 58, Beecher's case; Cro. Jac. 211, S. C.; Co. Lit. 138 b, S. P. (b) *Sed qu.* If plaintiff's counsel, with consent of the attorney, may not consent to a *retrazit*, though the plaintiff is not present in court? A juror is thus frequently withdrawn, when those concerned for the plaintiff clearly see it is for his benefit.

It is held, that a *retrazit* cannot be entered (c) before the plaintiff hath declared, and if entered before, it hath but the effect of nonsuit.

Dals. 78; 3 Leon. 19. (c) Whether a *retrazit* may be entered after a general verdict. Cro. Eliz. 465, *dubitatur*.

Debt was brought upon a bond against A, wherein A and B were jointly and severally bound, and after plea pleaded the plaintiff entered a *retrazit*, and in an action after brought against B upon the same bond, whether this should be a bar between (d) Dennis and Paine, Cro. Ja. 551, *dubitatur et adjournatur*. It was said, that a *retrazit* was in nature of a release, and a release to one joint obligor discharged the other; but on the other side it was said to be a bar only by way of estoppel between the parties, whereof no other should take advantage.

(d) Jon. 451, S. C., and judgment given for the plaintiff, because of a defect in the plea. March, 95, S. C. *dubitatur*, but varies in the stating it; for by this report, debt

(A) Nature of Nonsuit and *Retrahit*.

was brought both against A and B, and the plaintiff entered a *retrahit* against A; and whether this was a discharge of B, is made the question. Vide Cro. Eliz. 762. \*None but the defendant can demand the plaintiff. If neither plaintiff nor defendant appear after cause called, and jury sworn, the only way is to discharge the jury. Arnold v. Johnston, Str. 267; Smith v. Whistler, Ca. temp. Hard. 305, S. P. If a cause is tried by proviso, there must be a rule given in the office, *fiat nisi prius per proviso si querens fecerit defaultam*; and if there is not, and plaintiff is nonsuited, the nonsuit shall be set aside. Dodson v. Taylor, Str. 1055; [Proude v. Willimote, 1 Barnard. B. R. 18 acc. But it is sufficient if the defendant obtain this rule any time before the trial. King v. Pippet, 1 Term R. 695.] If it appears on the record, that no issue is joined, the jury must be dismissed. Heath v. Walker, Str. 1117. By stat. 14 Geo. 2, c. 17, if plaintiff neglects to bring the issue to trial according to the course of the court, the court, on motion, on notice, shall give judgment as in case of a nonsuit, unless they allow farther time, and defendant shall have costs as in case of a nonsuit. But if in action against two on a joint promise, there is judgment against one by default; and on plaintiff's neglecting to bring issue joined by the other on to trial, rule is obtained for judgment as in case of a nonsuit, yet costs cannot be taxed; for plaintiff could not have been nonsuited on a trial. Weller v. Goyton, 1 Burr. 358. A nonsuit at *nisi prius* must be recorded by the judge of *nisi prius*, and cannot afterwards be recorded in bank. Gardner v. Davis, 1 Wils. 301. If defendant has obtained a rule for costs for not proceeding to trial, he cannot afterwards move for judgment as in case of nonsuit. Barnes, 131, 314, 316. [Yet, where the plaintiff does not countermand notice of trial, but withdraws the record after the cause is called on, the court will make it a condition for discharging a rule for judgment as in case of a nonsuit, (on a peremptory undertaking to try,) that he shall pay the defendant the costs incurred by omitting to try. Jordaine v. Sharpe, 2 H. Bl. 280;] [1 East, 346.] *Non pros.* for want of declaration, demanded in the country, shall be set aside. Barnes, 311. If a judge of assize directs nonsuit erroneously, there is no remedy. Barnes, 311. [It is now settled, that such nonsuit may be set aside. Lady Windsor's case, 4 Burr. 1984.] If plaintiff dies after nonsuit, and before day in bank, it is not helped by the statute, but is error. Barnes, 312. Rule to declare in C. B., must be in the office where plaintiff's attorney practises. Barnes, 312. On motion for judgment, as in case of a nonsuit, there is a rule for the plaintiff to enter issue; if he does not, defendant may have *non pros.*; if he enters it the roll must be produced, and defendant may move for a nonsuit; if the court admit cause, why the nonsuit should not, &c., they appoint day for trial; on such motion, there must be an affidavit that the cause is not tried. Barnes, 313, 316. Sickness of plaintiff—marriage of *feme* plaintiff—that the bankrupt did not attend assignees, plaintiffs—that material witnesses were ill—or that the record was offered to be entered, though a little out of time; Barnes, 313, 514, 315, 316, 464; [the insolvency of the defendant since the action brought, Bailey v. Wilkinson, Dougl. 671; {1 Cain. 116, Lackey v. McDonald; 1 Johns. Rep. 141, Steinbach v. Hallett; Ibid. 143, Hart v. Storey;} or, that the cause was carried down and made a *remanet*, Mewburn v. Langley, 3 Term R. 1, are sufficient causes to prevent judgment as in case of a nonsuit.] {So is the sudden indisposition of counsel and attorney; 1 Cain. 152, Jackson v. Brown; or the want of papers which the plaintiff had good reason to expect; 2 Cain. 93, Jackson v. Mann; or a mistake of the attorney as to a rule of practice. 1 Cain. 22, Sheffield v. Watson; 2 Cain. 378, Patrick v. Hallett. See farther what are sufficient causes to prevent the judgment of nonsuit, 1 Cain. 6, 58, 129, 1 Johns. Ca. 242; 2 Cain. 246; 3 Cain. 94, 128; 7 Term 178; 1 East, 554. Where the plaintiff withdraws his record after entering it for trial, the defendant may have judgment as in case of a nonsuit; 1 East, 346, Burton v. Harrison.} [But where a cause has been made a *remanet* by consent, defendant may move for judgment, if plaintiff withdraw the record. Gadd v. Bennett, 2 Barn. & A. 709.] Indeed, the Court of Common Pleas have lately holden, that in all cases where an application is made for the first time for judgment as in case of a nonsuit, it is a sufficient answer to it, to undertake peremptorily to try, without alleging any reason for not having before tried the cause; and that whatever might have been formerly the practice, in future, it should be understood, that the first motion for judgment, as in case of a nonsuit, is only a mode of obtaining a peremptory undertaking to try. Mallet v. Hilton, 2 H. Bl. 119. It seems now, by the practice of the courts both of B. R. and C. P., that the judgment as in case of a nonsuit cannot be moved for till the third term after that in which issue is joined. Hall v. Buchanan, 2 Term R. 734; Da Costa v. Ledstone, 2 H. Bl. 558. [And though in the case of Frampton v. Payne, in C. P., 1 H. Black. 64, it was held that the motion might be made the next term, where issue was joined in the six first days of the preceding term, yet that case seems now to be overruled.]

(B) Who may be Nonsuit.

*Baker v. Newman*, 1 H. Black. 123; *Woulfe v. Sholls*, Ibid. 282; *Munt v. Tremamondo*, 4 Term R. 557; *Tidd's Prac.* 806, 807, (7th edit.) But if notice of trial has been actually given in a *town* cause for a sitting in or after term, the defendant in K. B. and C. P. may move for judgment in the next term. *Hay v. Howell*, 2 N. R. 397; *Tidd's Pract. ubi sup.*; and vide 2 Saund, 336 b, c. Replevins and actions *qui tam* are within the statute. *Barnes*, 315, 317. ¶ And an affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge the rule in a *qui tam* action, as well as any other. *Stone v. Farey*, 1 East, 554, and vide 7 Term R. 178. Affidavit that plaintiff did not try, because his attorney heard that a material witness would not be found in time for trial, held sufficient. *Robinson v. Chapman*, MSS. M. 1827, K. B. ¶ [A replevin is not within the statute; for in replevin both parties are actors, and the defendant may carry down the record by proviso. *Jones v. Concannon*, 3 Term R. 661; *Shortridge v. Hiern*, 5 Term R. 400; {1 Johns. Ca. 247, *Barrett v. Forrester*.} Judgment as in case of a nonsuit may be given in a traverse of a return to a mandamus. *Rex v. Mayor, &c.*, of Stafford, 4 Term R. 689.] ¶ So also in a writ of right, *Almgill v. Pierson*, 1 Bos. & P. 103. ¶ If plaintiff was ready, but the cause did not come on, because the view was not returned by six jurors, judgment shall not be signed. *Barnes*, 498. If defendant has obtained a rule for judgment *nisi*, the court will not give plaintiff leave to amend his declaration by striking out allegation, but judgment shall be absolute. *Barnes*, 318. Judgment as in case of a nonsuit, may be moved for without term's notice, though no proceedings in a year. *Barnes*, 308; ¶ 5 Term R. 634. ¶ In replevin, if plaintiff does not appear at the trial, but defendant brings down record, nonsuit shall be entered, and not verdict for defendant; if it is, it shall be so amended at defendant's cost. *Barnes*, 458. [Where a plaintiff has once proceeded to trial, judgment as in case of a nonsuit cannot be entered for not proceeding to a new trial. *Porzelius v. Maddocks*, 1 H. Bl. 101.] {*Contra*, in New York, 2 Cain. 378, *Patrick v. Hallett*; 1 Johns. Rep. 541, *Jackson v. Meyers*.} ¶ If plaintiff defers proceeding, in order to await a decision of a similar question in another cause, he will not be relieved against a rule for judgment, as in case of nonsuit, unless he show to the court what is the point to be decided, and in what cause. *Wynn v. Bellmon*, 6 Taunt. 122. But if plaintiff oppose the rule, on ground that documentary evidence could not be procured in time, he need not state what the evidence is. *Greenhill v. Michell*, 6 Taunt. 150. The court will not entertain the motion pending a demurrer. *Butcher v. Kiernan*, 2 Marsh. 364. But after judgment for defendant, on demurrer to special pleas, there may be judgment of nonsuit against plaintiff for not proceeding to trial on other issues. *Praxton v. Popham*, 10 East, 366. ¶

(B) Who may be Nonsuit.

It is everywhere agreed that the king, being in supposition of law always present in court, cannot be nonsuit in any information or action wherein he himself is the sole plaintiff. But it is held, that any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, and thereby wholly (a) determine the suit, as well in respect of the king as of himself.

*Bro. Nonsuit*, 68; Co. Lit. 139 b; Roll. Abr. 131. (a) But *qu.* if this does not mean a nonsuit on the merits, and if such plaintiff, by collusion with the defendant, does not choose to proceed, whether the king may not proceed for his share of the penalty?—In a *qui tam* action, judgment as in case of a nonsuit may be entered on a rule to show cause. *Watson v. Johnson*, P. 25 G. 2; 1 Wils. 325.

If an infant bring an assize by guardian, although that the infant disavow the suit in proper person, yet no nonsuit shall be awarded.

39 Ass. pl. 1; 2 Roll. Abr. 130, S. C.

Where an executor need not name himself executor, he shall pay costs upon a nonsuit, and the naming himself executor shall not exempt him from it.

6 Mod. 181.

If an attorney of Common Pleas is sued in an action there, he shall not be demanded, because he is supposed always present aiding the court.

20 H. 6, 44 b; Roll. Ab. 581, S. C.

(C) In what Actions there may be a Nonsuit.

A PERSON may be nonsuit in a writ of error.

2 Roll. Abr. 130.

A person may be nonsuit in a writ of false judgment.

Sid. 225, S. P.; 20 H. 6, 18 b; 2 Roll. Abr. 130, S. C.

One cannot be nonsuit in any action in which he is not an actor or demandant; and though he afterwards become an actor, yet not being originally so, he cannot be nonsuit as an avowant. So, if garnishees who become actors, but were not so originally.

22 E. 4, 10.

So, if a person outlawed hath a charter of pardon, and sues a *scire facias* against the party, though hereby he is an actor, yet he cannot be nonsuit.

2 Roll. Abr. 130.

So, if a man traverse an office he cannot be nonsuit, although he is actor, for he hath no original pending against the king.

2 Roll. Abr. 130; Dyer, 141, pl. 47, this is made a *quare*.

But in a petition of right against the king the plaintiff may be nonsuit.

11 H. 452; 2 Roll. Abr. 130.

So, in an *audita querela* to avoid a statute, the plaintiff may be nonsuit, for he is plaintiff in this action.

47 E. 3, 5 b.

If to two *nilis* returned on a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be nonsuit; for the statute ordains, that upon his appearing he ought to count against the defendant.

45 E. 3, 16. [See 1 Camp. 484.]

In ejectment if the defendant do not appear at the trial, and confess lease, entry, and ouster, according to the consent rule, the practice is to call the defendant, and on his non-appearance or refusal to comply with this rule, to call the plaintiff and nonsuit him, and then at the plaintiff's instance the cause of nonsuit is endorsed upon the *postea*, which entitles the plaintiff to judgment against the casual ejector when the *postea* is returned into court. If there be several defendants and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, endorsing upon the *postea* that such verdict is entered for them because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession.

Tidd's Prac. 918, (8th edit.)

But in ejectment by landlord against tenant on the statute 1 Geo. 4, c. 87, § 2, whenever it shall appear upon the trial, that such tenant or his attorney has been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule, and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry, and ouster; and the judge before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the

(D) At what time a Nonsuit may be.

same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein, and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits. Provided always, that nothing therein contained shall be construed to bar any such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment.

1 G. 4, c. 87, Tidd's Prac. 918, (8th edit.)

§ The Circuit Court of the United States has no authority whatever to order a peremptory nonsuit against the will of the plaintiff. This point has been repeatedly settled by the Supreme Court, and is not now open for controversy.

Crane v. The Lessee of Morris, 6 Pet. 598.

(D) At what time a Nonsuit may be.

At the common law, upon every continuance or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonsuit.

Co. Lit. 139 b. That at common law, if he did not like the damages given by the jury, he might be nonsuit. 5 Mod. 208.

But now by the 2 H. 4, c. 7, it is enacted in the words following:—  
“Whereas, upon verdict found before any justice in assize of *novel disseisin*, *mort d'ancestor*, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict pass against the plaintiff, that the plaintiff shall not be nonsuited.”

But notwithstanding this statute it hath been held, that the plaintiff may be nonsuited after a special verdict, or after a demurrer and (a) argument thereupon.

Co. Lit. 139; 2 Jon. 1; 2 Roll. Abr. 131, 132; 3 Leon. 28; and vide 2 Hawk. P. C. c. 23, § 95. (a) In debt upon an obligation, upon demurrer, the case being argued, the opinion of the court was against the plaintiff, and rule given, that judgment should be entered for the defendant; and the plaintiff prayed that he might be nonsuited; and because he had the same term appeared, and argued by his counsel, and had prayed judgment, he could not be nonsuited the same term. Cro. Ja. 35.

If there be judgment to account, and auditors assigned, and thereupon a *capias ad computandum*, the plaintiff cannot be nonsuited on the original, because the original is determined by the judgment to account.

2 Roll. Abr. 131. Vide Co. Lit. 139 b.

If the defendant wages his law, and a day is given him over to another term to make his law, if the plaintiff does not appear that day he will be nonsuited: otherwise, if he wages his law immediately, or, as some hold, on a day in the same term.

3 H. 6, 13; 2 Roll. Abr. 131.

¶ After a plea of tender it is said plaintiff cannot be nonsuited; (b) but it is the practice to nonsuit him if he cannot make out his case after paying money into court. (c)

(b) 1 Camp. 327, but see notes. (c) Tidd. 675, (8th ed.,) and cases there cited.

Where a cause is undefended at *nisi prius*, and the judge directs a non-

(E) How far the Nonsuit of one shall be the Nonsuit of another.

suit, with liberty to the plaintiff to move to enter a verdict, the court may order a verdict to be entered accordingly for the plaintiff.

4 Barn. & A. 413.

When a cause is carried down by proviso, and the plaintiff does not appear at the trial, he should be nonsuited: but where a verdict in such case was taken for the defendants by mistake, instead of a nonsuit, the court, though this was irregular, would not permit the plaintiff to set it aside, unless he would consent to a nonsuit being entered.

1 Barn. & C. 110; and see *Ibid.* 94.¶

¶ A nonsuit cannot be ordered at a trial without the plaintiff's consent.

*Doe v. Grimes*, 1 Pet. 469; *De Wolf v. Rabaud*, 1 Pet. 476; *Mitchell v. The New England Mar. Ins. Co.*, 6 Pick. 117.

The plaintiff may become nonsuit, as of right, at any time before trial, (a) or before verdict. (b)

(a) *Haskell v. Whitney*, 12 Mass. 47. (b) *M'Naughton's ex'rs v. Mosely*, 1 Hay. R. 331.

But after verdict (c) or after the cause has been opened, (d) he cannot become nonsuit but by leave of court. And a nonsuit will be ordered only for the deficiency of the evidence on the part of the plaintiff. (e)

(c) *Locke v. Word*, 16 Mass. 317; *Hendrick v. Stewart*, 1 Tenn. 476. (d) 13 Mass. 47; 16 Mass. 317. (e) *Rose v. Learned*, 14 Mass. 154.¶

(E) How far the Nonsuit of one shall be the Nonsuit of another.

In real or mixed actions, the nonsuit of one demandant is not the nonsuit of both; but he that makes default shall be summoned and severed: but regularly, in personal actions, the nonsuit of the one is the nonsuit of both.

Co. Lit. 139; 2 Inst. 563; 2 Roll. Abr. 132. Several cases to this purpose.

But in personal actions, brought by executors, there shall be summons and service, because the best shall be taken for the benefit of the dead; and so it is in action of trespass by them, as executors, for goods taken out of their own possession. Like law in account by them, as executors, by the receipt of their own hands.

Co. Lit. 139 a. Vide head of *Executors*.

In an (g) *audita querela* concerning the personalty, the nonsuit of the one is not the nonsuit of the other; because it goeth by way of discharge, and freeing themselves, and therefore the default of the one shall not hurt the other.

Co. Lit. 139. (g) In an *audita querela, scire facias*, attaint, the nonsuit of one shall not prejudice the other. 6 Co. 26.

In a *quid juris clamat* the nonsuit of the one is the nonsuit of both, because the tenant cannot attorn according to the grant.

Co. Lit. 139 a.

Some actions follow the nature of those actions whereupon they are grounded; as, the writs of error, attaint, *scire facias*, and the like. If a real action be brought by several *præcipes* against two or more, if the demandant be nonsuit against one, he is nonsuit against (h) all; for, as to the demandant, it is but one writ under one *teste*.

Co. Lit. 139 a, b; 2 Roll. Abr. 133. (h) But where a plaintiff may enter a *nolle prosequi* against one, and have judgment against the rest, vide 2 Roll. Abr. 101; Cro. Car. 239, 243; Hob. 70, 180; Carth. 19; 3 Mod. 101.

In an appeal against divers, whether they plead the same or several



(G) Of the Effect of a Nonsuit.

issues, it hath been adjudged, that a nonsuit against one, at the trial of any one of the issues, is a nonsuit as to all, because such a nonsuit operates in nature of a release to the whole.

Cro. Eliz. 460, pl. 6; Dyer, 120; 2 Roll. Abr. 133; Sid. 387.

A *latitat* was sued out against four defendants in trespass, the plaintiff was nonsuit for (a) want of a declaration, and the defendants' attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint; and though the plaintiff may count severally against the defendants, yet it remains joint till it is severed by the count.

2 Salk. 455, pl. 1; Comyns, 74. (a) There is a nonsuit before appearance at the return of the writ, or after appearance at some day of continuance. Co. Lit. 138 b.

[In trespass against several, if any of them suffer judgment by default, the plaintiff cannot be nonsuited.

Harris v. Batterley, Cowp. 483.]

||And the rule is the same in *assumpsit*.

Hannay v. Smith, 3 Term R. 662.]

(F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole.

It is laid down as a general rule, that a nonsuit for part is a nonsuit for the whole. But it hath been held, that if a defendant plead to one part, and thereupon issue be joined, and demur to the other, the plaintiff may be nonsuit as to one part, and proceed for the other.

2 Leon. 177; Hob. 180. ||Vide 10 East, 366, acc.]

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is so confessed, but there is a *cessat executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonsuited in this issue, this shall not be a nonsuit for the damages to be given, because that he had judgment.

2 Roll. Abr. 134.

If in trover for divers goods the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others that he had them of the gift of the plaintiff, and as to the rest not guilty; and as to the first, the plaintiff enters *non vult ulterius prosequi*; this amounts only to a *retrahit*, and is no nonsuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule, that a nonsuit for part is a nonsuit for the whole.

2 Leon. 177, Sir John Sands v. Packsal Brocas.

(G) Of the Effect of a Nonsuit: And herein of its being a peremptory Bar.

A nonsuit, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature. But this general rule hath the following exceptions:—

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the court, a writ to the bishop; and the incumbent, that cometh in by that writ, shall never be removed; which is a flat bar to that presentation.

Co. Lit. 139 a.

2. Nonsuit in an appeal of murder, rape, robbery, &c., after (b) appear-

## (H) Of setting aside a Nonsuit.

ance, is peremptory, and this *in favorem vitæ*. (c) But the nonsuit of the plaintiff in an appeal is not such an acquittal, on which the defendant shall recover damages against the abettors, by West. 2, c. 12, unless after the nonsuit he were arraigned at the king's suit upon the appeal, and acquitted.

Co Lit. 139 a. (b) But the bare taking out of a writ of appeal, and causing it to be delivered of record to the sheriff, and a nonsuit upon it, is no bar of a second appeal; because it doth not appear of record, but that it might be done by a stranger; and therefore the nonsuit must be after an appearance in proper person of record. 2 Hawk. P. C. c. 23, § 181. (c) 2 Inst. 385.

3. So, if the plaintiff, in an appeal of mayhem, be nonsuit after appearance, it is peremptory; for the words herein are *felconicè mayhemavit*.

Co. Lit. 139 a.

4. A nonsuit after appearance is also peremptory in a *nativo habendo*, and the nonsuit of one plaintiff in that action nonsuits both *in favorem libertatis*. But in a *libertate probandâ* such nonsuit is not peremptory; neither is the nonsuit of one plaintiff the nonsuit of both.

Cro. Lit. 139 a; Cro Eliz. 881.

5. Such nonsuit is also peremptory in an attain, but a discontinuance in an attain is not, because there is a judgment given upon the nonsuit, but not upon the discontinuance.

Co. Lit. 139 a.

¶ A decision of the court in favour of the defendant, upon an agreed statement of facts, and a nonsuit of the plaintiff entered, and judgment thereon for the defendant for his costs, pursuant to such agreement, constitute no bar to a subsequent action for the same cause.

Knox v. Waldoborough, 5 Greenl. 185.

A judgment of nonsuit in the county court, for non-compliance with an interlocutory order of the court, is not a sentence or judgment, nor does it import a trial, within the statute relating to appeals.

Hoyt v. Brokos, 10 Conn. 188.

A plaintiff at law went to trial in a case where he might have sued in equity, and a verdict by surprise was rendered against him, which he might have prevented by suffering a nonsuit. He was not permitted afterwards to resort to a court of equity.

Tarpley's admr. v. Dobyns, 1 Wash. 185.

## (H) Of setting aside a Nonsuit.

A nonsuit cannot be set aside without laying some ground, by affidavit or otherwise, upon which the court can proceed.

Dearing v. Taylor, 1 Tenn. 49.

The necessary absence of the plaintiff's attorney is sufficient ground for setting aside a nonsuit.

Williams v. King, 1 Tenn. 185.

A nonsuit cannot be set aside by consent of parties without consent of the court.

M'Pherson v. Hynds, 1 Tenn. 197.g

## NUISANCES.

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A **COMMON** nuisance is an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires.

2 Roll. Abr. 83; Hawk. P. C. c. 75.

Under which description we shall consider,

(A) What shall be said a Nuisance: ¶And herein of unlicensed Players, and illegal Joint Stock Companies.

(B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.

(C) How a Nuisance is to be removed or abated.

(D) How the Offence is punishable.

§ (E) When an action will lie for a Nuisance.¶

For Nuisances relating to the Highways, vide title "HIGHWAYS."

For those relating to Bridges, tit. "BRIDGES."

For those relating to Public-houses, tit. "INNS AND INNKEEPERS."

¶Vide also tit. "ACTION ON THE CASE."¶

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(A) What shall be said a Nuisance: ¶And herein of unlicensed Players, and illegal Joint Stock Companies.¶

It is clearly agreed, that keeping a bawdy-house is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness.

3 Inst. 205; Kitchen, 11; Hawk. P. C. c. 75, § 6; 2 Burr. Rep. 1232. § Showing or exhibiting stud horses in a town, is a nuisance. *Nolin v. Mayor, &c., of Franklin*, 4 Yerger, 163.¶

Also it hath been adjudged, that this is such an offence of which a feme covert may be guilty as well as if she were sole; and that she, together with her husband, may be indicted and condemned to the pillory for keeping a bawdy-house; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband: and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex.

Salk. 348, pl. 35, *The Queen v. Williams*.

It is clearly agreed, that all common gaming-houses are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices, and incite to idleness, and avaricious ways of gaining property, great numbers, whose time might otherwise be employed for the general good of the community. Also, it hath been (a) adjudged, that this is such an offence for which a feme covert may be indicted; for

(A) What is a Nuisance. (*Unlicensed Players, &c.*)

as, in the preceding case, the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnishing the guests with all conveniences for that purpose.

Hawk. P. C. c. 75, § 6. ¶ *Vide tit. Gaming.* (a) Trin. 2, G. 1, *The King v. Dixon*.

It seems to be the better opinion, that all common stages for rope-dancers, &c., are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood.

Mod. 76; 2 Keb. 846; 3 Keb. 464; Vent. 169; 5 Mod. 142; Hawk. P. C. c. 75, § 6.

But it seems the better opinion, that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; as, where they draw together such numbers of coaches or people, &c., as prove generally inconvenient to the places adjacent; or, when they pervert their original institution, by recommending vicious and loose characters under beautiful colours to the imitation of the people, and make a jest of things commendable, serious, and useful.

Rushworth's Coll. part ii. vol. i. fol. 220, 247; Roll. R. 109; 5 Mod. 142; Skin. 625, pl. 21.

And now for the better regulation of players and playhouses, by the 10 G. 2, c. 28, it is enacted, "That every person who shall for hire, gain, or reward, act, represent, or perform, or cause to be acted, (a) represented or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in case such person shall not have any legal settlement in the place where the same shall be acted, represented, or performed, without authority by virtue of letters patent from his majesty, his heirs, successors, or predecessors, or without license from the lord chamberlain of his majesty's household for the time being, shall be deemed to be a rogue and a vagabond, within the intent and meaning of the 12 Ann. stat. 2, c. 23, and shall be liable and subject to all such penalties and punishments, and by such methods of conviction, as are inflicted on, or appointed by the said act for the punishment of rogues and vagabonds who shall be found wandering, begging, and misordering themselves, within the intent and meaning of the said act."

And see 25 G. 2, c. 36, made perpetual by 28 G. 2, c. 19, for preventing thefts and robberies, regulating places of public entertainment, and punishing persons keeping disorderly houses. And note: these sort of players are within the description of the vagrant act, 17 G. 2, c. 5. ¶ But this is repealed by 5 G. 4, c. 83, so that players are no longer within the penalties of the vagrant acts; and see Burn, Just. 659, (25th ed.) ¶ \* By 25 G. 2, c. 36, § 2, houses and gardens of entertainment in London and Westminster, or within twenty miles thereof, are not to be kept without license.—By 30 G. 2, c. 24, § 14, penalties are inflicted on publicans permitting journeymen to game in their houses. ¶ (a) See *Rex v. Glossop*, 4 Barn. & A. 616. ¶

And by § 2, it is further enacted, "That if any person, having or not having a legal settlement as aforesaid, shall, without such authority or license as aforesaid, act, represent, or perform, or cause to be acted, represented, or performed, for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, every such person shall, for every such offence, forfeit the sum of 50l.; and

(A) What is a Nuisance. (*Unlicensed Players, &c.*)

in case the said sum of 50*l.* shall be paid, levied, or recovered, such offender shall not, for the same offence, suffer any of the pains or penalties inflicted by the said recited act."

And by § 3, it is further enacted, "That no person shall for hire, gain, or reward, act, perform, represent, or cause to be acted, performed, or represented, any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any new prologue or epilogue, unless the copy thereof be sent to the lord chamberlain of the king's household for the time being, fourteen days at least before the acting, representing, or performing thereof, together with an account of the playhouse or other place where the same shall be, and the time when the same is intended to be first acted, represented, or performed, signed by the master or manager, or one of the masters or managers of such playhouse, or place, or company of actors therein."

And it is further enacted by § 4, "That it shall and may be lawful to and for the said lord chamberlain for the time being, from time to time, and when and as often as he shall think fit, to prohibit the acting, performing, or representing any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, or any prologue or epilogue; and in case any person or persons shall for hire, gain or reward, act, perform, or represent, or cause to be acted, performed, or represented, any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, or any new prologue or epilogue, before a copy thereof shall be sent as aforesaid, with such account as aforesaid; or shall for hire, gain, or reward, act, perform, or represent, or cause to be acted, performed or represented, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, or any prologue or epilogue, contrary to such prohibition as aforesaid; every person so offending shall, for every such offence, forfeit the sum of 50*l.*; and every grant, license, and authority, (in case there be any such,) by or under which the said master or masters, manager or managers, set up, formed, or continued such playhouse, or such company of actors, shall cease, determine, and become absolutely void, to all intents and purposes whatsoever."

Provided, § 5, "That no person or persons shall be authorized, by virtue of any letters patent from his majesty, his heirs, successors, or predecessors, or by the license of the lord chamberlain of his majesty's household for the time being, to act, represent, or perform for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in any part of Great Britain, except in the city of Westminster, and within the liberties thereof, and in such places where his majesty, his heirs or successors, shall in their royal persons reside, and during such residence only."

And it is further enacted by § 6, "That all the pecuniary penalties inflicted by this act, for offences committed within that part of Great Britain called England, Wales, and town of Berwick upon Tweed, shall be recovered by bill, plaint, or information in any of his majesty's courts of record at Westminster, in which no essoin, protection, or wager of law shall be allowed; and for offences committed in that part of Great Britain called Scotland, by action or summary complaint before the court of sessions or judiciary there; or for offences committed in any part of Great Britain, in a summary way, before two justices of the peace for any county, stewardry,

## (A) What is a Nuisance.

riding, division, or liberty, where any such offence shall be committed, by the oath or oaths of one or more credible witness or witnesses, or by the confession of the offender, the same to be levied by distress and sale of the offender's goods and chattels, rendering the overplus to such offender, if any there be, above the penalty and charge of distress; and for want of sufficient distress the offender shall be committed to any house of correction in any such county, stewardry, riding, or liberty, for any time not exceeding six months, there to be kept to hard labour, or to the common goal of any such county, stewardry, riding, or liberty for any time not exceeding six months, there to remain without bail or mainprise; and if any person or persons shall think him, her, or themselves aggrieved by the order or orders of such justices of the peace, it shall and may be lawful for such person or persons to appeal therefrom to the next general quarter sessions, to be held for the said county, stewardry, riding, or liberty, whose order therein shall be final and conclusive; and the said penalties against this act shall belong, one moiety thereof to the informer, or person suing or prosecuting for the same, the other moiety to the poor of the parish where such offence shall be committed."

And it is further enacted by § 7, "That if any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, shall be acted, represented, or performed, in any house or place where wine, ale, beer, or other liquors shall be sold or retailed, the same shall be deemed to be acted, represented, and performed for gain, hire, and reward.

"Provided that every prosecution, for any offence within this act, shall be commenced within six calendar months after the offence is committed."

[Tumbling is not an entertainment of the stage within the meaning of the above act.

Rex v. Handy, 6 Term R. 286.]

It was formerly held, that the erecting of a dovehouse on a man's own frank-tenement was a nuisance, because the pigeons(*a*) and doves were to be accounted tame animals, inasmuch as they had *animum revertendi*; and that therefore, whoever erected such houses, were answerable for the damages done by them; and because they were not liable to every man's action, to avoid multiplicity of suits, it was thought a matter indictable in the leet. But the contrary opinion has prevailed; because it was allowed the lord of the manor might erect, or permit by his license any person to erect, a dovehouse, which he could not do if it were a nuisance, every nuisance being *malum in se*. Besides, these animals are rather to be accounted *feræ naturæ*; and by consequence, the only remedy any person had, for the damage sustained by the birds feeding on his ground, was to kill them and take them to himself, which was the proper relief according to the common law; inasmuch as the birds were accounted no man's property. But it is said, that a dove-cote newly erected in a manor, without the lord's license, is a good ground for an action on the case, at the suit of the lord.

2 Roll. Abr. 138; Poph. 148; Cro. Ja. 382; Godb. 259; Cro. Eliz. 548; Roll. Rep. 136, 200; 2 Roll. Rep. 3. 4, 34; 5 Co. 104; Moor, 238. (*a*) As to pigeons, see 1 Jac. 1, c. 27, amended by 2 G. 2, c. 29.

It is clearly agreed to be a nuisance to dig a ditch, or make a hedge overthwart a highway, or to erect a new gate, or to lay logs of timber in it; or generally to do any other act which will render it less commodious. But it seems that a gate, which has continued time out of mind, is no nuisance; but that the same may be justified by prescription, being at first intended to

## (A) What is a Nuisance.

have been set up by consent, on a composition with the owner of the land, on the laying out the road; in which case, the people had never any right to a freer passage than what they still enjoy.

Vide tit. *Highways*, letter (E); Jon. 221. At common law, a fence in a road is a common nuisance, and he who builds it may be fined and imprisoned. *Gregory v. The Commonwealth*, 2 Dana, 417. And any individual may abate it. *Walls v. Stetson*, 2 Mass. 143; *Arundel v. M'Culloch*, 10 Mass. 70; *Cro. Car.* 104; *Bulst.* 203; 2 Roll. Abr. 137.

{ Where a place has been used as a public fair or market for above twenty years, to which persons have resorted for the purpose of exposing articles to sale, they shall not be liable to be indicted for a nuisance, as for obstructing the highway, if fairly engaged in using the place as a fair or market.

4 Esp. Rep. 111, *The King v. Smith.* }

And as navigable rivers are deemed highways, it is a nuisance to divert part of the river, whereby the current of it is weakened, and made unable to carry vessels of the same burden as it could before. Also, the laying of timber in a common river, though the soil belong to the party, is equally a nuisance as if the soil was not his, if, thereby, the passage of boats, &c., is obstructed. And hence, also, it seems to follow, that private stairs from those houses that stand by the Thames into it are common nuisances. But it seems, that where there are cuts made in the banks, that are not annoyances to the river, the timber lying there is no nuisance.

*Noy*, 103; 3 Keb. 640, 759.

{ Weirs erected across rivers are public nuisances.

7 East, 198, *Weld v. Hornby.*

So are bridges erected without authority over navigable rivers.

3 Mass. T. Rep. 263, *Hood v. Proprietors of Dighton Bridge.*

On an indictment for a nuisance in erecting a wharf on the public property, the defendant cannot give in evidence that the erection of the wharf was beneficial to the public, and therefore not to be considered a nuisance.

1 Dall. 150, *Respublica v. Caldwell.* }

{ A wharf erected on the Thames between high and low water-mark, and which occupied the place of a former recess, was held to be a public nuisance, since it deprived the public of the convenience of refuge in this recess in case of storm, and also of an eddy which was convenient to the navigation. And although the defendant claimed the wharf as lessee under the conservators of the river, it was held he had no right to make the erection.

*Rex v. Lord Grosvenor and others*, 2 Stark. 511.

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned judge to acquit the defendants if they thought that the abridgment of the right of passage occasioned by those erections was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury, that by means of the staiths coals were supplied at a cheaper rate, and in better condition than they otherwise could be, which was a public benefit. Held by *Holroyd and Bayley, Js.*, that this direction to the jury was proper; *Lord Tenterden, C*

## (A) What is a Nuisance.

J., *dissent.*, on the ground that the benefit arising from the staiths to the public ought not to be considered by the jury.

Rex v. Russell, 6 Barn. & C. 566.]

¶ Without a special grant, an individual cannot lawfully construct and moor a floating warehouse or vessel for the receiving and delivering out of goods and merchandise in any public river, or in any port or harbour, or in any of the basins or docks thereof, for such permanent appropriation and exclusive occupation of a portion of a public river, &c., is an obstruction to its free and common use, and is indictable as a public nuisance.

Hart v. The Mayor, &c., of Albany, 9 Wend. 571. See Hale, De Port. Mar. 85; 6 B. & Cr. 566; 2 Stark. N. P. C. 511; Cro. Car. 266; 1 Salk. 12; Rex v. Ward, 1 M. & W. 570.

The erection of any thing in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable.

Howell v. M'Coy, 3 Rawle, 256.

The continuance of a nuisance, created by the overflowing of lands by means of a mill-dam for twenty years and upwards, although it confers a right to the use of the lands flowed, is no defence to the proceeding on the part of the public to abate it, or to an action by an individual for special damages sustained by him in consequence of it.

Mills v. Hall, 9 Wend. 315. See Howell v. M'Coy, 3 Rawle, 256.

Where an act of parliament authorized a company to make a railway and use locomotive engines upon it, and the railway was in some places made parallel to the public highway, and the locomotives frightened the horses of people travelling on the highway; on an indictment against the company for a nuisance, it was held that the company had the right so to use the said locomotives, and that they were not a nuisance.

Rex v. Pease, 4 Barn. & Adol. 30.

An act of the legislature gave to M and his assigns the right of erecting and maintaining a dam upon a navigable river; the dam was so built as to impede the navigation beyond what the act authorized; held that this rendered it, *pro tanto*, a public nuisance, and liable to be abated by any person.

Renwick v. Morris, 3 Hill, 621.g

It hath been holden to be a common nuisance, to divide a house in a town for poor people to inhabit in; by reason whereof it will be more dangerous in the time of infection or the plague.

2 Roll. Abr. 139, pl. 3; ¶ Meeker v. Van Ransellaer, 15 Wend. 397, acc.g

¶ A house which, from the purpose for which it is used, or the situation in which it is placed, may not be a nuisance, may become so by negligence in keeping it; and when this is the ground of the prosecution, it must be so laid in the indictment.

State v. Purse, 4 M'Cord, 472.g

¶ [So, an inoculating house for the small-pox seems to be indictable as a nuisance; and it is an indictable nuisance to carry a person infected with a contagious disorder along a public highway where persons are passing.

Rex v. Sutton, 4 Burr. 2116; Rex v. Vantandillo, 4 Maul. & S. 73.

And mixing alum with bread to such an extent that crude lumps of alum were found in the bread, was held an indictable offence.

Rex v. Burnett, 4 Maul. & S. 372; Rex v. Dixon, 3 Maul. & S. 11.]

Bringing a great ship of 300 tons into Billingsgate-dock, though a com-



(A) What is a Nuisance. (*Noisome Trades.*)

mon dock, yet being only so for small ships coming with provision to the markets of London, is a nuisance; in the same manner, as a man using with his cart a common pack and horseway, so as to plough it up, and thereby render it less convenient to riders, is a nuisance indictable.

6 Mod. 145, *The Queen v. Leich.*

It seems the better opinion, that a brewhouse, glasshouse, chandler's shop, sty for swine, set up in such inconvenient parts of a town, that they cannot but greatly incommode the neighbourhood, are common nuisances.

2 Roll. Abr. 139; Cro. Car. 510; Hut. 136; Palm. 536; Vent. 26; Keb. 500; 2 Salk. 458, pl. 3, 760, pl. 7; 2 Ld. Raym. 1163.

β The erection of any building, which, from its disagreeable odor, or noxious effluvia, is offensive or unwholesome, may be a nuisance; but whether it actually is or is not, must depend upon circumstances.

*State v. Purse*, 4 M'Cord, 472.g

{ Keeping large quantities of gunpowder in a house near to dwelling-houses and a public street may or may not be a nuisance according to circumstances; and the circumstances making it such must be set forth in the indictment. To keep it in a magazine properly constructed and secured is not unlawful; but if by negligence or want of care it becomes dangerous, the owner may be indicted.

1 Johns. Rep. 78, *The People v. Sands*; 12 Mod. 342, Anonymous.}

[Buildings for making acid spirit of sulphur, whereby the air was impregnated with noisome and offensive stinks in a parish, near the king's highway, and near several dwelling-houses, were declared a nuisance.

1 Burr. 333, &c., in the case of the late Doctor Ward's erections at Twickenham.

|| And it is not necessary that the smell should be *unwholesome*; it is enough if it renders the enjoyment of life and property *uncomfortable*.

1 Burr. 337. β The occupation of a building in a city as a slaughter-house is *prima facie* a nuisance to the neighbouring inhabitants, and may be restrained by injunction. *Catlin v. Valentine*, 9 Paige, 575.g

So an indictment for erecting a mill for steeping sheep-skins in water, near to and adjoining the highway and several dwelling-houses, by which the air was corrupted, was held good.

*Rex v. Pappineau*, 1 Stra. 686; and see 2 Stark. Ca. 458.

But where the indictment was for a nuisance in erecting furnaces and ovens for burning coke, the judge directed an acquittal, although it appeared that the sulphurous smoke was very offensive to the inhabitants of the adjoining houses; that the furniture was spoiled, and that flakes of fire often came from the flue of the furnace; but the houses were all inhabited, and not diminished in value; and the judge said, that to constitute a nuisance, it must appear that the grievance was either destructive to the general health of the inhabitants, or rendered their dwellings uncomfortable or untenable.

*Rex v. Davey*, 5 Espin. 217.

And where the defendant was indicted for erecting a noisome melting-house in a neighbourhood where other noxious manufactories had been carried on for many years, Lord Kenyon left it to the jury to consider whether the nuisance was much increased by this addition of the defendant, and the defendant was acquitted.

*Rex v. B. Neville*, Peake's Ca. 90; and see *Rex v. Watts*, 1 Moo. & Malk. 281.

So, where it appeared that the offensive manufacture had been carried on

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near fifty years, Lord Kenyon directed a verdict of not guilty; but in a subsequent case, Lord Ellenborough, C. J., said, it was immaterial how long a practice had prevailed, for no length of time would legitimate a nuisance; and his lordship added, "The stell fishery across the river at Carlisle had been established for a vast number of years, but Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated."

*Rex v. S. Neville, Peake, Ca. 92; Rex v. Cross, 3 Camp. 227; and see 7 East, 199; 4 Esp. 111.*

It seems that erecting gunpowder-mills, or keeping gunpowder-magazines near a town, is a nuisance by the common law, for which an indictment or information will lie; and the making, keeping, or carrying of too large a quantity of gunpowder at one time, or in one place or vehicle, is prohibited by the statute 12 Geo. 3, c. 61. And it appears that persons putting on board a ship an article of combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in stowing it, will be guilty of a misdemeanor.

*vide, 1 Russell on Crimes, p. 431; Williams v. E. I. Comp., 3 East, 192, 201.]*

It is enacted by 9 & 10 W. 3, c. 7, "That it shall not be lawful for any person to make or cause to be made, or to sell or utter, or offer or expose to sale any fireworks, or any cases, moulds, or implements for making the same, on pain of 5*l.* on conviction before one magistrate on the oath of two witnesses: or, for any person to permit fireworks to be cast, thrown, or fired from, out of, or in his house, lodging, or habitation, or from, out of, or in any part or place thereto belonging or adjoining, into any public street, highway, road, or passage, on pain of 20*s.* on conviction as aforesaid: or for any person to cast, throw, or fire, or to be aiding or assisting therein, on pain of 20*s.*, and that every such offence is and shall be adjudged a common nuisance."

By 10 & 11 W. 3, c. 17, all mischievous games, called lotteries, and all other lotteries, are declared to be public and common nuisances.

See too 17 G. 2, c. 5; 27 G. 3, c. 1. *[Vide the lottery acts, collected, Burn's Just. Gaming, III.]*

By 6 G. 1, c. 18, § 19, "All undertakings, attempts, and projects by public subscriptions, for adventuring on certain schemes of commerce, tending to the common grievance of his majesty's subjects, or a great number of them, and the receiving and paying of any money upon such subscriptions, &c., and more particularly the presuming to act as a body corporate, or to raise transferable funds, or pretending to act under any charter formerly granted from the crown for any particular or special purpose therein expressed, by persons making or endeavouring to make use of such charter, for any such other purpose not thereby intended, and also acting or pretending to act under any such obsolete charter, &c., shall be deemed a public nuisance."]

*[Now repealed. See p. 232.]*

*[The first conviction on this statute was for an unlawful undertaking to carry on trade to the North Seas, whereby many persons were defrauded of great sums of money, and the defendant was fined and imprisoned during the king's pleasure. No subsequent prosecution appears to have taken place upon it till about eighty-seven years afterwards, when a motion was made for a criminal information for attempting to establish a paper manufactory and a distillery company, and to raise joint stocks of 50,000*l.* and*

## (A) What is a Nuisance. (*Illegal Companies.*)

100,000*l.*, by transferable shares of 50*l.* each. The court were of opinion that the projects were mischievous and illegal within the meaning of the act, and particularly in holding out the delusion that no person was to be accountable beyond the amount of the share for which he should subscribe; but considering the length of time during which the statute had been dormant, and that the proceeding was by a relator who did not appear to have been deluded himself, they refused the criminal information.

*Rex v. Caywood*, 1 Stra. 472; *Rex v. Dodd*, 9 East, 516.

But in the case of the “Birmingham Flour and Bread Company,” the object of which was to buy corn and make bread, and deal in and distribute bread and flour among the members of the company, 20,000 in number, and the shares were only transferable to such persons as should enter into all the covenants of the original partnership-deed, and, amongst others, to buy weekly portions of bread and flour; the court seemed to be of opinion, that the mere raising transferable stock was not *per se* an offence within the act, unless it had relation to some undertaking *tending to the common grievance, prejudice, or inconvenience* of his majesty’s subjects; and that considering the *qualified* extent to which the shares were transferable, there was not in that case *such* a raising of transferable stock as fell within the scope of the act.

*Rex v. Webb & others*, 14 East, 406.

So, a bond for payment of monthly subscriptions to a building society was held not to be void under this statute, the object of the society being to build houses, and the shares being only transferable in case the purchaser should be approved by the society, and should become party to the original articles.

*Pratt v. Hutchinson*, 15 East, 511.

But where the plaintiff sought to recover, as money had and received, an excessive payment to the defendant, for the purchase of shares in the “British Ale Brewery,” and it was objected that the parties were *in pari delicto*, the company being a nuisance within the statute, Sir James Mansfield nonsuited the plaintiff.

*Buck v. Buck*, 1 Camp. 547; *sed vide* 4 Taunt. 587.

And Lord Ellenborough held that an indictment would not lie for a conspiracy to deprive a man of the office of secretary to the “Philanthropic Annuity Society,” by reason of the illegality of the society; and that collecting subscriptions for the society came so near to obtaining money on false pretences, that a man prosecuted for so doing could not be considered as prosecuted without reasonable or probable cause.

*Rex v. Stratton*, 1 Camp. 549, note; and *vide* 3 Maule & S. 488.

So, where an action was brought for work and labour, &c., done in purchasing for defendant shares in a concern called “The Equitable Loan Bank Company,” and the objects of the company did not appear, but it appeared that they professed to have a capital of two millions in shares of 50*l.* each, that a deposit of 1*l.* per share was required on delivery of certificates of shares to holders, that the shares were to be transferable without restriction, and the holders to be subject to such regulations as might be contained in any act of parliament passed for the government of the society, and in the mean time to such regulations as might be made by a committee of manage-

(B) How far the Indictment must charge it to be an Annoyance, &c.

ment; it was held that this company was illegal, and that the plaintiff could not recover compensation for purchasing shares in it.

*Joseph v. Pebrer*, 3 Barn. & C. 639. See Lord Eldon's remarks on these companies, 1 Russell's R. 458. A bill in equity lies to recover deposits paid by a shareholder in a company, where the scheme is a mere bubble. *Green v. Barrett*, 1 Sim. R. 50.

By the 6 Geo. 4, c. 91, the section above set out, and also the 18th and 20th sections of 6 Geo. 1, c. 18, are repealed; provided that no action or suit then depending should be affected; and by § 2, it is enacted, that in any future charter for the incorporation of any company, it shall be lawful to provide that the members of the corporation shall be individually liable for the debts, contracts, and engagements of the corporation, to such extent, and subject to such regulations, as his majesty may deem fit.

6 G. 4, c. 91.]]

(B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.

EVERY nuisance, punishable by a public prosecution, must be charged to be *ad commune nocumentum*, or to the general annoyance of all the king's subjects; for if they are only injuries to particular persons, they are left to be redressed by the private actions of the parties aggrieved by them.

2 Roll. Abr. 83; Hawk. P. C. c. 75, § 3.

And therefore an indictment for surcharging such a common, or enclosing such a piece of ground, or disturbing such a water-course, or doing any other act not apparently of a public nature, to the nuisance of the inhabitants of such a town, or of J S and his tenants, is not good.

Hawk. P. C. *ubi supra*, and several authorities there cited.

[[So, upon an indictment against a tinman for the noise made in carrying on his trade, it appearing that the noise only affected the inhabitants of three numbers in Clifford's Inn, and that by shutting the windows the noise was in a great measure prevented; it was ruled by Lord Ellenborough that the indictment could not be sustained, and that the grievance, if any thing, was a private nuisance.

*Rex v. Lloyd*, 4 Esp. 200.]]

So, an indictment in a court-leet for keeping a glasshouse *ad maximum nocumentum* was quashed, because it was not a nuisance unless it had been *ad commune nocumentum*.

Vent. 26; 2 Keb. 500.

So, an indictment for stopping a water-course was quashed, being only laid *ad nocumentum omnium prope inhabitantium*, without saying *et transeuntium*.

Mod. 107; 3 Keb. 284.

But it hath been held, that an indictment for not repairing a bridge, *per quod ligei domini regis transire non possunt*, &c., *ad nocumentum eorundem*, is sufficient; for by the king's liege people shall be understood all his liege people.

2 Leon. 183, 184; 9 Co. 113; Vent. 208; 3 Keb. 28.

Also, an indictment for doing a thing which plainly appears immediately to tend to the prejudice of religion, or of the king; as for breaking the walls

(C) How far a Nuisance may be abated.

of a church, or embezzling the king's treasure, &c., is good, without expressly laying it as a common grievance.

2 Roll. Abr. 83, 84; Hawk. P. C. c. 75, § 4.

So, an indictment of a common scold, by the words *communis rixatrix*, hath been held good, though it concluded, *ad commune nocumentum diversorum* instead of *omnium*; because, says Hawkins, from the nature of the thing, it cannot but be a common nuisance. And for the same reason, says he, an indictment with such a conclusion, for a nuisance to a river, plainly appearing to be a public and navigable river, or to a way, plainly appearing to be a highway, is sufficient. And perhaps, says he, the (b) authorities, which seem to contradict this opinion, might go upon this reason, that in the body of the indictment it did not appear with sufficient certainty, whether the way wherein the nuisance was alleged were a highway or only a private way; and therefore it shall be intended from the conclusion of the indictment that it was a private way.

6 Mod. 11, 178, 213, 239, 311; 2 Str. 999, 1246; Hawk. P. C. c. 75, § 5; Moor, 847; 2 Keb. 410; Keb. 161; Roll. Rep. 201. (b) Viz.: Cro. Eliz. 148; 2 Keb. 461; 2 Roll. Abr. 83.

(C) How a Nuisance is to be removed, or abated, & or prevented.

HEREIN it is laid down by Hawkins, that any one may pull down or otherwise destroy a common nuisance; as, a new gate or even a new house erected in a highway, &c.: for if one whose estate is or may be prejudiced by a private nuisance actually erected, as, a house hanging over his ground, or stopping his lights, &c., may justify the entering into another's ground, and pulling down and destroying such a nuisance, (b) whether it were erected before or since he came to the estate; surely, it cannot but follow *à fortiori* that any one may lawfully destroy a common nuisance. And as the law is now holden, it seems, that in a plea, justifying the removal of a nuisance, the party need not show that he did as little damage as need be.

Hawk. P. C. c. 75, § 12, for which are cited 2 Roll. Abr. 144, 145; Cro. Car. 184; Jon. 221; Yelv. 142; 5 Co. 101; 9 Co. 54; Salk. 458, pl. 3. [(b) Where a stack of chimneys on a house close to a highway, was, by reason of a fire, in immediate danger of falling, held that firemen were justified in removing them. Dewey v. White, 1 Moo. & Malk. Ca. 56.] A public nuisances are of two classes, namely: Physical, tangible objects; for example, a fence on the highway; and those which, being merely moral, are intangible; for example, the assembling and misconduct of persons at a disorderly house, the keeping of a tippling-house, &c. Private persons may abate the former on their own authority; the latter can be suppressed only by legal proceedings. Gray v. Ayres, 7 Dana, 375.

If a river be stopped to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns who have a common passage and easement therein, may be compelled to do it.

3 Ass. 10; 2 Roll. Abr. 137; Hawk. P. C. c. 75, § 13, said to have been adjudged. A corporation whose duty it is to prevent obstructions in a river, will be considered a party aggrieved, and may, by its own act, without indictment, abate or remove such nuisance. Hart v. The Mayor, &c. of Albany, 9 Wend. 571.

A public nuisance may be abated by any one; but a private nuisance can be abated only by the party injured.

Gates v. Blincoe, 2 Dana, 158. See Wetmore v. Tracy, 14 Wend. 250.

It seems to be the better opinion, that the Court of King's Bench may, by a (c) mandatory writ, prohibit a nuisance, and order that the same shall be

## (D) How the Offence is Punishable.

abated; and that if the party disobeys the writ he subjects an attachment. But upon such attachment, for proceeding after the writ of prohibition, there ought to be a declaration setting forth the nature of the offence, and that the same is a nuisance, and that, notwithstanding the writ of prohibition, the defendant proceeded in or continued it; to which if the defendant can in pleading set forth a sufficient justification, his proceeding *post prohibitionem regiam* will be good in law, and himself discharged of all contempt and costs against the complainant.

(c) A writ to prohibit a bowling-alley erected near St. Dunstan's church, said by Hale to have been granted, 8 Car. 1, on Noy's motion. Mod. 76. So, a prohibition restraining Jacob Hall, a rope-dancer, who had erected a stage at Charing-cross. Vent. 169, 2 Keb. 846; Mod. 76; and vide Skin. 625, pl. 21; 5 Mod. 142.

¶ The indictment should state the nuisances to be *continuing*, otherwise the court will not give judgment to abate it.

Rex v. Stead, 8 Term R. 142; Rex v. Incledon, 13 East, 164.

The statute 1 & 2 Geo. 4, c. 41, after reciting that injury is sustained from the improper construction, as well as from the negligent use of furnaces employed in the working of engines by steam, and that every such nuisance being of a public nature is abateable by indictment, enacts, "That if it shall appear to the court by which judgment ought to be pronounced, in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful to the court, without the consent of the prosecutor, to make such order touching the premises as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted."

By the third section it is provided, "That this act shall not be construed to extend to the owners or proprietors, or occupiers, of any furnaces or steam engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in manufacturing the produce of such ores or minerals, on or immediately adjoining the premises where they are raised."¶

✓ β A preliminary injunction will be allowed to prevent a nuisance where the right is clear, the consequent danger immediate, and the mischief irreparable: but not when the right is doubtful, and the danger remote or contingent.

City of Rochester v. Curtiss, 1 Clarke, 336.g

## (D) How the Offence is punishable.

ALL common nuisances to the public are regularly punishable by fine and imprisonment, at the discretion of the judges; but in some cases corporal punishment may be inflicted, as in the case of a common scold, who is said to be properly punishable by being put into the ducking-stool. Also the offence of keeping a bawdy-house is punishable, not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion shall seem proper.

2 Roll. Abr. 84; Hawk. P. C. c. 75, § 14; 6 Mod. 11, 178, 213; Salk. 382, pl. 31.

Also a person convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs; and per Hawkins, it is but reasonable that those who are convicted of any other common nuisance should also have the like judgment.

2 Roll. Abr. 84; Hawk. P. C. *ubi supra*. β An infant only two years, upon whose

## (E) Where an Action will lie for a Nuisance.

lands a nuisance has been erected, cannot be made criminally answerable for it. Nor can a married woman be indicted for a nuisance erected by her husband on her lands. *The People v. Townsend et al.*, 3 Hill, 479.

But it is clearly agreed, that common nuisances against the public are only punishable by a public prosecution; and that no action on the case will lie at the suit of the party injured; as this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore, in those cases, the remedy must be by indictment at the suit of the king.

Co. Lit. 56 a; Roll. Abr. 88, 110; 2 Roll. Abr. 140, 141; Moor, 180; 4 Co. 18; 9 Co. 113; 2 Brownl. 147; Vaugh. 341; Cro. Eliz. 664; 3 Mod. 294; Carth. 191; Salk. 15, pl. 7.

But if by such a nuisance the party suffer a (a) particular damage, as if, by stopping up a highway with logs, &c., his horse throws him, by which he is wounded or hurt, an action lies. (b)

Co. Lit. 56; Cro. Ja. 446; Keb. 847; 2 Jon. 157; Salk. 15, pl. 15. (a) But if a highway is stopped, that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected; this is not such a special damage, for which an action on the case will lie; but a particular damage to maintain this action ought to be direct, and not consequential; as, for instance, the loss of his horse, or some corporal hurt, in falling into a trench in the highway, &c. Carth. 194; 1 Esp. Rep. 148, *Hubert v. Groves*, S. P. But the cases of *Chichester v. Lethbridge*, *Willes*, 71, and *Hughes v. Heiser*, 1 Bin. 463, are *contra*. In the former case the special damage laid was, that the plaintiff at divers times attempted to travel on the road, and was prevented by the obstructions, and was opposed by the defendant in removing them; in the latter case that the plaintiff had prepared rafts, with intent to navigate them down a river which was a public highway, and that he did navigate them until he came to a dam, erected by the defendant, by which he was prevented from passing down the river with his rafts; and in each case, the special damage was held to be sufficient to support the action. See *Willes*, 74, note (a). [(b) But this does not extend to entitle one, who has received detriment by a county bridge being out of repair, to bring an action against the inhabitants of that county, there being no ground to consider them, for this purpose, as a corporation, and in that capacity liable to be sued. 2 Term R. 667;] {Vaugh. 340, S. P.}

Also an action lies for continuing a nuisance; as where, for erecting a nuisance 2 *die Febr.*, the defendant pleaded a prior action, brought for erecting a nuisance 20 *die Martii*, and a recovery thereupon, and averred these to be the same nuisance and erection; and on demurrer the plaintiff had judgment; for though he cannot have a new action for the same erection, yet he may for the continuing the same nuisance.

Salk. 10. pl. 3; Carth. 455; Ld. Raym. 370.

## (E) Where an Action will lie for a Nuisance.

An action on the case lies against one erecting a nuisance, and one continuing a nuisance erected by another.

*Staple v. Spring*, 10 Mass. 72.

An action for a nuisance will lie where a franchise is essentially injured, unless a proper indemnity is made, notwithstanding a license from the government.

*Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

A person who has received an injury, in consequence of an obstruction in the highway, cannot maintain an action on the case for damages, if he did not use ordinary care, by which the obstruction might have been avoided.

*Smith v. Smith*, 2 Pick. 621.

A dug a ditch through which water was conducted from his land to an

(A) Of the Nature of the Security called a Bond or Obligation.

old clay pit in B's brick-yard; and, the water becoming stagnant and offensive, the board of health ordered B to fill the pit, which was done at B's expense; held, that A was liable to an action for the nuisance.

*Shaw v. Cummiskey*, 7 Pick. 76.

In case of a public nuisance, one sustaining special damages may have his action for the damages.

*Stetson v. Faxson*, 19 Pick. 147; *Barden v. Crocker*, 10 Pick. 388.*g*

## OBLIGATIONS.

(A) Of the Nature of the Security called a Bond or Obligation: [And herein of its Assignment, its Forfeiture, and their Effects.]

(B) What Words create such a Security.

(C) Of the Ceremonies requisite to a Bond or Obligation: And herein of Signing, Sealing, Date, and Delivery.

(D) Of the Parties to the Obligation: And herein,

1. *Who may bind themselves, or be Obligors.*
2. *Who may take such Security, or be Obligees.*
3. *Who shall be said the Obligee; and herein of making several Obligees.*
4. *Where there are several Co-obligors or Sureties; and herein where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.*
5. *Of their Remedies against each other.*

(E) Of the Condition and Consideration of the Obligation.

(F) How the Breach of the Condition must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

(A) Of the Nature of the Security called a Bond or Obligation: [And herein of its Assignment, its Forfeiture, and their Effects.]

OBLIGATION, says my Lord Coke, is a word in its own nature of a large extent, but is usually taken in the common law for a bond, containing a penalty with condition for payment of money, or to do or suffer some act or thing, &c.; and a bill, says he, is most commonly taken for a single bond without condition.

Co. Lit. 172 a. *β* See Bouv. L. D. h. t. for a definition of Obligation, and *Cantey v. Duren*, Harper, 434; *Taylor v. Glaser*, 2 S. & R. 502; *Harman v. Harman*, 1 Bald. 129; *Skinner v. M'Carty*, 2 Porter, 19; *Demming v. Bullitt*, 1 Blackf. 241; *Dinton v. Adams*, 6 Verm. 40.*g*

This security is also called a specialty; {'} the debt being therein particularly specified in (a) writing. And the party's seal, acknowledging the debt or duty, and confirming the contract, renders it a security of a (b) higher nature than those entered into without the solemnity of a seal; and there-



## (A) Of the Nature of a Bond.

fore bonds or specialties shall be (c) preferred to simple contracts, in a course of administration. And from its being a higher security, it is held, that for a breach or non-performance an action of debt (d) only will lie.

β {1} Although in the body of the writing it is not said that the parties have set their hands and seals, yet if the instrument be really sealed, it is a specialty, and if it be not sealed, it is not a specialty, although the parties in the body make mention of a specialty. *Taylor v. Glaser*, 2 S. & R. 502.γ (a) An obligation may be made upon parchment or paper, and in loose parchment or paper, or in a piece of parchment or paper sewed in a book, and either way it is good; but if it be made on a tally, piece of wood, or any other thing but paper or parchment, (although it be sealed and delivered,) it is void. Bro. Oblig. 30, 67.—Because these are least subject to alteration or corruption. Co. Lit. 229 a.—May be in a letter, or other writing, so it be sealed. Comb. 87; 3 Mod. 154.—But note, that by the late statutes it must be on stamped paper or parchment. (b) Therefore if a man accepts an obligation for a debt due by simple contract, this extinguishes the simple contract debt. Roll. Abr. 604; 2 Leon. 110.—So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere duty at common law. Yelv. 38. [But the bond of a surety will not extinguish the simple contract debt of the principal. *White v. Cuyler*, 6 Term Rep. 176.]—Also, from its being of a higher nature than a simple contract, the defendant cannot plead *nil debet*, but must plead *solvit ad diem*, or *non est factum*; for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*. 2 Inst. 651; Hard. 218. (c) For this wide head of *Executors and Administrators*. (d) And therefore it is held, that if the obligor in a bond, without any new consideration, as forbearance, &c., promises to pay the money, an *assumpsit* will not lie, but the obligee must still pursue his remedy by action of debt. Roll. Abr. 8; Hut. 34; Cro. Eliz. 240.

A bond or obligation is a debt or duty which adheres to the obligor or debtor, let it be contracted where it will, and let the debtor fly to what place he pleases; and being chargeable everywhere, it need not be dated from any particular place, and therefore usually begins with *Noverint universi*: but yet the plaintiff in his declaration must lay a place where it was made, that it may receive trial if it be denied.

Cro. Eliz. 773; Salk. 141; 3 Lev. 348; 6 Mod. 228. [If the bond be dated at a certain place, the declaration should set it out as made at the true place, and introduce the place of trial under a *videlicet*. 1 Str. 612. Therefore, where the plaintiff declared, "that the defendant by his bond *apud London concessit*," &c., and on oyer, the bond appeared to be dated at Port St. David in the East Indies, which was not mentioned in the declaration, the variance was pronounced to be fatal. *Roberts v. Harnage*, 2 Salk. 659.] [But there seems no more reason for stating the real date of a bond than of a foreign bill or note, in which cases it is not necessary, though usual. *Bayley on Bills*, 173; *Houiet v. Morris*, 3 Camp. 304.]]

A bond is (a) a *chose in action*, which cannot be assigned over, so as to enable the assignee to sue in his (b) own name; yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it.

Co. Lit. 232. (a) That being given to a feme sole, who afterwards marries, and the husband dies, it shall survive to her, being a *chose in action*, which the husband might have reduced into possession.—So, if the wife, who is the obligee, dies, her husband is no otherwise entitled to it than as administrator to his wife. Noy, 149; Style, 205. For this vide tit. *Baron and Feme*. (b) And by the modern practice, he may sue for it in the name of the obligee, as his attorney; but *quære*, Whether this can be done without an express authority? [A power for this purpose is usually contained in the assignment, and ought always to be so.] β A bond payable wholly or partly in personal services is not assignable. *Henry v. Hughes*, 1 J. J. Marsh. 454; *Halbert v. Deering*, 4 Litt. 9; *Bothick v. Purdy*, 3 Mis. 82. See *Cobb v. Williams*, 1 Hill, 375. In Pennsylvania a bond is assignable by virtue of a statute. *Wheeler v. Hughes*, 1 Dall. 23; *Cummings v. Lynn*, 1 Dall. 444; 5 Binn. 232; 4 S. & R. 177; 9 S. & R. 141; 4 Yeates, 170; Addis. 55. See *Ensign v. Kellogg*, 4 Pick. 1; *Damersett v. Willard*, 8 Cowen, 206.γ

Also, in equity, a bond is assignable for a valuable (c) consideration paid,

## (A) Of the Nature of a Bond.

and the assignee alone becomes entitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again.

2 Vern. 595; Abr. Eq. 44; there must be a consideration paid. 3 Chan. R. 90. (c) 2 Vern. 540. But payment to the obligee, without notice of the assignment, is good. Chan. Ca. 232.  $\beta$  See Welch v. Mandeville, 1 Wheat. 236; Dix v. Cobb, 4 Mass. 511; Parker v. Grout, 11 Mass. 157; Eastman v. Wright, 6 Pick. 316; Wheeler v. Wheeler, 9 Cowen, 34; Young v. Forgey, 4 Hayw. 10; Norton v. Rose, 2 Wash. 233; Picket v. Morris, 2 Wash. 255; Clute v. Robinson, 2 Johns. 595; Cowen v. Shields, 1 Ten. 314; Mayo v. Giles, 1 Mumf. 533. But the assignee of a gaming bond, who has been induced to take the assignment by the obligor, will be entitled to recover the amount due on it, although, without such inducement, the assignee would have taken the bond liable to all the equities to which it was subject in the hands of the assignor. Buckner v. Smith, 1 Wash. 295; Woodson v. Barrett, 1 Hen. & Mumf. 80. $\gamma$

|| And if the obligor, after notice of an assignment, take a release from the obligee, and plead it to an action by the assignee, in the name of the obligee, the court will set aside the plea, and will not, under such circumstances, allow the obligor to plead payment.

Legh v. Legh, 1 Bos. & Pul. 447; and see 4 Maul. & S. 423; Jones v. Herbert, 7 Taunt. 421; Innell v. Newman, 4 Barn. & A. 419.||

The assignee must take it subject to the same equity that it was in the hands of the obligee; as if, on a marriage-treaty, the intended husband enters into a marriage-brokerage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor.

2 Vern. 428, 692, 764.  $\beta$  See Wheeler v. Hughes, 1 Dall. 23; Ingles v. Ingles' Ex'rs, 2 Dall. 49; Rundle v. Ettwein, 2 Yeates, 23; Solomon v. Kimmel, 5 Binn. 232; Bury v. Hartman, 4 S. & R. 177. $\gamma$

|| So a bond, assigned as a security for money paid to the use of one who has committed a secret act of bankruptcy, cannot be retained against his assignees.

Hammersley v. Purling, 3 Ves. 757.

A bond given for a general purpose of raising money, and deposited by the obligee as a security, shall be liable to the obligee's debt. *Secus* if given for a special purpose, for then it is unassignable.

Cator v. Burke, 1 Bro. Ch. Ca. 434.

When a bond is assigned by the obligee towards satisfaction of a debt owing from him to another, the assignee is chargeable with any loss incurred by a forbearance shown to the obligor; for if he indulge the obligor, without the concurrence of the obligee, he must stand the consequences.

*Ex parte Mure*, 2 Cox, 63.

But though it is true that in general an assignee of a chose in action takes it subject to all equity, yet time and circumstances may vary that rule.

Hill v. Caillovel, 1 Ves. 122.||

Bonds are to be considered as securities for the performance of contracts, and are usually entered into with (a) penalties, which are to be considered as (b) compensations for the breach of the contract; as, that a man shall pay 200*l.* if he omits to pay 100*l.* within such a time, that he shall pay so much if he does not perform such and such covenants, do or omit such and such acts; and in those he may *cedere suo jure*, provided the thing be not unlawful in itself, or injurious to the public, &c.

Yelv. 192; 2 Mod. 201; Sand. 66;  $\beta$  Canal Company v. Sansom. 1 Binn. 70; Gra-

## (A) Of the Nature of a Bond.

ham v. Bickham, 4 Dall. 149; S. C. 2 Yeates, 32.*g* (a) That the reservation of a greater sum than is allowed by the statute for interest, for the non-payment of the principal at the end of the year, is not usurious within the statute, because it is in the power of the borrower to avoid the payment of the money so reserved, by paying the principal at the day appointed. 5 Co. 69; Cro. Ja. 509. (b) A contract or covenant to give bond for the payment of a certain sum of money, without showing of what sum the obligation shall be, is good, and shall be intended of double the sum. 5 Co. 77 b, 78 a; Lev. 88.—So, where there was an agreement to enter into certain covenants, and to enter into a bond for the performance of the covenants; and upon an action, breach was laid that he did not enter into bond, &c., and a verdict for the plaintiff; in arrest of judgment it was moved, that this part of the agreement was uncertain and void, because it was not expressed of what sum the bond should be, and here was no certainty to guide it, as in the above case: but *per* Windham, J., the sum in the bond must be to the value of the agreement; *et per cur.*—You should have entered into bond, though the sum were never so small, and why did you not tender such a one? Sid. 270; Keb. 776.

¶ Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered in equity as the principal intent of the deed, and the penalty is only accessional, and only operates to secure the damage really incurred: and the court will relieve by injunction until the actual damage sustained shall be ascertained by an issue.

Slooman v. Walter, 1 Bro. Ch. Ca. 418; Hardy v. Martin, 1 Cox, 26; Errington v. Aynsley, 2 Bro. Ch. Ca. 341; 1 Brown, 418; and *vide* *tit. Agreement, (B).*¶

If a man enter into a bond of such a sum, on condition to be void on payment of a less sum; or, if a man bind himself in a penalty of 100*l.* that he will pay 50*l.* by such a day; after the day of payment is past, the penalty or sum of 100*l.* is the legal debt; and for so much it hath been (a) resolved, that an executor of an obligor of such forfeited bond may cover the assets of his testator.

Cro. Car. 490; Vent. 354; 3 Lev. 368. (a) Hil. 9 G. 2, in B. R., The Bank of England v. Morris, 2 Stra. 1028; 2 Barnard. K. B. 183, S. C.; Cas. temp. Hardw. 219, S. C.; 4 Bro. P. C. 287, S. C. *β* See Monroe v. Alaire, 2 Caines, 328; Postmaster-General v. Cochran, 2 Johns. 413.*g* [It is more correct to plead the sum really due; and indeed, if the bond be not forfeited, such sum only can be pleaded. 5 Term R. 309. However, if the penalty be pleaded, the plaintiff may reply the sum really due for principal and interest, which he may aver the obligee is ready to receive, and that the bond is kept on foot by fraud.]

And as the penalty, by the bond being forfeited, becomes the legal debt; so there was no remedy against such penalty, but by application to a court of equity, which relieves in those cases, on payment of principal, interest, and costs. Also, though at law (b) there can be no remedy beyond the penalty, because in that the obligee seems to have taken up his security; yet, as it is on the foundation of doing equal justice to both parties that equity proceeds, it will, on any application for a favour from the obligor, compel him to pay the principal, interest, and costs, though exceeding the penalty. (c)

Show. Par. Ca. 15; Abr. Eq. 91, 92; Salk. 154; Vern. 342, 350; 2 Vern. 509. [(b) It hath been holden in some cases, that in an action *at law* on a bond, damages may be recovered beyond the amount of the penalty. Lord Lonsdale v. Church, 2 Term R. 388; {3 Cain. 48, Smedes v. Hooghtaling; 1 Mass. T. Rep. 308, Harris v. Clap; 2 Mass. T. Rep. 118, Pitts v. Tilden; 2 Dall. 252, Peritt v. Wallis. See 10 Ves. J. 409, *Ex parte* Rushforth;} *sed vide* Wilde v. Clarkson, 6 Term R. 303, *contr.*; ¶ and see Shutt v. Procter, 2 Marsh. 226. But in an action on a *judgment recovered upon a bond*, interest may be recovered as damages beyond the penalty; and this although it be a foreign judgment, for *transit in rem judicatam*, and the nature of the demand is altered. McClure v. Dunkin, 1 East, 436, and Blackmore v. Flemyng, 7 Term R. 446; and see Bodily v. Bellamy, 2 Burr. 1094; Collins v. Collins, 2 Burr.

## (A) Of the Nature of a Bond.

896; *Hilhouse v. Davis*, 1 Maul. & S. 169; *Moore v. M'Namara*, 1 Ball & B. 311. And so also where the penalty is the same sum as the principal in the bond, and the condition is to pay with lawful interest. *Francis v. Wilson*, Ry. & Moo. 105. And more than the penalty of bonds has been decreed in equity where they were given only as a collateral security for the performance of a trust, and the demand was not grounded upon the bonds. *Kirwane v. Blake*, 2 Bro. P. C. 333—342. So, where a bond was given as a collateral security, with a mortgage for the same debt. *Clark v. Lord Abingdon*, 17 Ves. 106. And where advantage has been made of the money, interest may be carried beyond the penalty. *Dunsany v. Plunkett*, 2 Bro. P. C. 251. So where a party is by injunction prevented from recovering his debt at law, or where an *elegit* creditor is brought into equity for an account. *Atkinson v. Atkinson*, 1 Ball & B. 238; [also 1 East, 436, *M'Clure v. Dunkin*. But in an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. And in this respect there is no difference between a foreign and domestic judgment. *Id. ibid.*] (c) In general, however, the rule of equity is not to compute any thing beyond the penalty of the bond. *Tew v. Earl of Winterton*, 3 Br. Ch. Rep. 492; [Knight v. Maclean, 3 Bro. Ch. Rep. 495; *Sharpe v. Scarborough*, 3 Ves. 557; *Mackworth v. Thomas*, 5 Ves. 329; *Clarke v. Seton*, 6 Ves. 416.] Thus, where there was a devise for payment of debts, it was holden, that simple contract debts, even for seventy years' standing, were renewed by it, and were ordered to be paid with full interest; but the bond debts were only allowed interest to the amount of the penalty. *Ketilby v. Ketilby*, before Lord Bathurst, cited in 2 Anstr. 527. So, though the principal and interest on a mortgage-bond exceed the penalty, yet the obligee, on a bill to redeem, can claim only to the extent of the penalty. *Lloyd v. Hatchett*, *Ibid.* 525.] [See also *Show. P. C.* 15, *Duval v. Terrey*; 3 Ves. J. 557, *Sharpe v. Earl of Scarborough*; 5 Ves. J. 329, *Mackworth v. Thomas*; 6 Ves. J. 79, 92, *Pulteney v. Warren*; *Ibid.* 411, *Clarke v. Seton*.]

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore he is not entitled to interest, yet, as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him principal, and the interest which accrued as well before as after the entering up of the judgment.

*Abbr. Eq.* 92, 288.

Also, by the 4 & 5 Ann. c. 16, it is enacted, "That where any action of debt shall be brought on any single bill, or where an action of debt, or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due on such bill or judgment, such payment shall and may be pleaded in bar of such action or suit; and where an action of debt is brought upon any bond, which hath a condition or defeasance to make void the same, upon payment of a less sum at a day or place certain; if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not strictly made according to the condition or defeasance, yet it shall and may be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded."

And it is further enacted by the said statute, § 14, "That if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court, where the action is (a) depending, all principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond: the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the

## (B) What Words shall create a Security.

said bond ; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly. (b)

(a) One cannot move to stay proceedings upon a bond upon payment of principal, interests, and costs, till bail be put in ; for till then the parties are not in court. 6 Mod. 11. {If a judgment has been entered and execution sued out for the penalty of a bond, the court will set aside the execution, and order satisfaction to be entered, on payment of the debt and interest due on the condition, with costs, though the bond was given for a larger debt than that mentioned in the condition, and for the overplus a promissory note was given, which remains unpaid, and the amount of which, it was verbally agreed at the time, might be levied by execution on the judgment, if it was not duly honoured. 2 Cain. 256, *Bergen v. Boerum*.}—(b) Stealing a bond made felony, by 2 G. 2, c. 25, § 3, [repealed by 7 & 8 G. 4, c. 27, and re-enacted with additions, 7 & 8 G. 4, c. 29, § 5.]

|| Where the bond was conditioned in a penal sum for payment of a less sum generally, without naming a day, and no interest was reserved in terms, it was objected, that it was not within the statute, as not being payable at a certain day ; but the court held it was payable on the day of the date, and referred it to the master to compute principal and interest.

*Farquhar v. Morris*, 7 T. R. 124.

If the obligor omits to pay the interest at the day, whereby the bond is forfeited, the obligee may sue him for the penalty, though the principal is not yet due, and the court will not stay proceedings on payment of the interest only, although the non-payment was a mere slip. It seems, however, they will restrain execution to the interest and costs.

*Van Sandau v. —*, 1 Barn. & A. 214 ; *Tighe v. Crafter*, 2 Taunt. 287. β When a penal bond becomes absolute by the failure to pay one of several instalments, execution will ensue only for the amount that has become payable. *Ridgely v. Lee*, 3 Har. & M'H. 94 ; *Hopkins v. Deaves*, 2 Browne, 93 ; and see *Sparks v. Garrigues*, 1 Binn. 152 ; *Gorman v. Richardson*, 6 S. & R. 163 ; *Cocke v. Stewart*, 2 Overt. 231 ; *Warwick v. Matlack*, 2 Halst. 165.γ

The Court of Exchequer will not make reference to the master to compute principal and interest after verdict for the plaintiff on the bond.

*Eastmond v. Hole*, 3 Price, 219.

A *post obit* bond seems to be within the statute.

*Murray v. Stair*, 2 Barn. & C. 82 ; and see *Doug. 519* ; *sed vide* 1 Atk. 118. ||

## (B) What Words create such a Security.

HEREIN we must observe, that the law does not seem to require any particular set form of words, as essentially necessary to create an obligation, but that any words, which declare the intention of the party, and denote his being bound, will be sufficient ; because such obligation is only in nature of a contract, or a security for the performance of a contract, which ought to be construed according to the intention of the parties.

*Yelv. 193* ; 2 Roll. Abr. 146, 147.

Therefore, if a man useth this form of words, viz. : *This bill witnesseth that I, A B, have borrowed 10l. of C D* ; or this form, *Memorandum, quod talis debet to B ten pounds* ; or thus, *Memorandum, all things reckoned and accounted between A and B. A cognovit se debere to B ten pounds* ; all these forms are good, and shall as effectually bind the party, and his executors, as if the most formal words were made use of, provided the writing be sealed and delivered.

*Dyer*, 23 b.

So, a writing in this form, *Memorandum, I, A B, have agreed to pay J S 20l.*,  
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B. What Words shall create a Security.

though this be in the precontracted time, yet if it hath all other ceremonies  
~~intention, it shall amount to an obligation.~~

Case 25.

So, in this case, the bill contained that J. H. I. have received of T. B. 40*l.*  
 to the use of J. H. I. children, &c. equally to be divided between them;  
 which said J. H. I. agrees to have received to the use of the said J. H. I., and the same to re-  
 pay to the said J. H. I. as soon as he shall be thought meet for the profits of the said R. and J. S.,  
 this was intended to be a good obligation.

Case 26. 27.

So, a writing in this form, Memorandum, that I bind myself to J. M. to pay  
 him as much money as my brother owes him: and in the end of the bill is  
 written the sum of 4*l.* which is said to be the debt due from the brother;  
 this is a good obligation.

Case 28. and vide Case 29. 30.

Memorandum, that I have now promised to pay to J. I. 10*l.* at any time after  
 the Feast, &c. where there is no time expressed for the payment whereof I bind myself  
 to J. I. by these promises: this is a good bill to A. by the first words, and the  
 latter being surcharged and void, shall to be rejected.

Case 31. 32.

It is said in Moor and Cro. Eliz. that a bill in this form, *Be it known, &c.*,  
 that I owe to J. I. 10*l.* to be paid at the Feast, &c. together with 6*l.* which I  
 have now upon this and recovery subscribed with my hand, amounts only to  
 a bill for 16*l.* but a Over stands if a good obligation for the whole debt  
 of 20*l.*

Moor. 377. Parry v. Woodward, assigned. And that the words, "together with 6*l.*  
 which I owe to J. I.," &c. are only an explanation of the precedent date. Cro. Eliz.  
 377. S. C. assigned, and that that which comes after the antecedent is void, as that  
 which comes after an antecedent. (a) Over, 22 b. in margin.

In debt for 20*l.* the plaintiff declared that the defendant *concessit se teneri*  
*per scriptum suum obligatorum, &c.* and the words of the deed were, *I do*  
*acknowledge to Edward Watson my twenty pounds upon demand, for doing*  
*the work in my garden: and upon demurrer to the declaration, it was ad-*  
*judged a good bond.*

Vide 386: Watson v. Sewel.

These words, *I am content to give to W. 10*l.* at Mich. and 10*l.* at our La-*  
*zar-day,* amount to an obligation, and an express engagement to pay, &c.

3 Levin 113: 2 Roll. Abr. 146 S. P.

It hath been held in variety of cases, that a seeming Latin word, not pro-  
 perly expressing the quantity of the sum in which the party intended to be  
 bound, should, notwithstanding, be so construed as to answer the intention  
 of the parties, rather than that the obligation should be void; as *quinqua-*  
*gressimus libris*, for *quingenta libris*, has been held good; so, *trigintate*  
 for *triginta*; *seringenta* for *seraginta*; and it is said in general, that in most  
 cases where the *gent* or *gint*, or the *sex* or *sept* are right, the obligation has  
 been held well.

But for this vide 10 Co. 133 a; Yelv. 96, 193, 306; Hob. 119; Cro. Ja. 290, 309,  
 335, 603, 607; Cro. Car. 147; Brownl. 62; 2 Roll. Abr. 146; 5 Modd. 154; 2 Jon. 53;  
 Comb. 60, 86, 187, 477; Ld. Raym. 335; 5 Mod. 287; 2 Salk. 462, pl. 2. [By sta-  
 tute 4 G. 2, c. 26, bonds must be in the English language, and not in Latin or French,  
 or any other language whatsoever.]

A bond in *viginti nobilis* has been held a good bond for 6*l.* 8*s.*; for

## (C) Of the Ceremonies requisite to a Bond.

though *nobilis* be not a Latin word, yet it being a term signifying 6*l.* and 8*s.* it may properly be made use of.

Cro. Ja. 203; 2 Roll. Abr. 146, *Burchin v. Vaughan*.

Debt brought on by bond for 60*l.*, the bond was in Italian, and the sum therein expressed was in these words, viz. *in cessanti libris*, and adjudged to be good.

Cro. Ja. 208, *Parker v. Rennaday*.

In a debt upon a bill obligatory, demanding thirty-two pounds four shillings and seven pence; the defendant demanded oyer of the bill, and it was *threty-two ponds* four shillings and seven pence, so threty for thirty, and ponds for pounds; and on demurrer for this cause, it was adjudged for the plaintiff.

Cro. Ja. 607, *Hulbert v. Long*.

So a bill, in which the party bound himself in the sum of *sewtene pounds*, has been held a good obligation for 17*l.*, in order to answer the intention of the parties.

10 Co. 133 a, in *Osborne's case*; 2 Roll. Abr. 147, S. P. cited.

¶ Where the obligatory part of the bond omitted the word "pounds," and stated that the obligor became bound in 7700, the word "pounds" was supplied, since it was manifestly intended.

*Coles v. Hulme*, 8 Barn. & C. 568; and see 1 Marsh. R. 214.

And where a man was bound in an obligation, and it was not said to whom, the name was supplied.

*Langdon v. Goole*, 3 Lev. 21; and see 2 P. Wms. 151; 1 Cox, 200; 2 Ves. sen. 100, 371; *Ibid.* 194; 2 Jack. & Walk. 1.¶

## (C) Of the Ceremonies requisite to a Bond or Obligation: And herein of Signing Sealing, Date, and Delivery.

It is said, that there are only three things essentially necessary to the making a good obligation, viz. writing in paper or parchment, {1} sealing, and delivery; but it hath been (a) adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named Erlin, and he signs his name Erlwin, that this variation is not material, because subscribing is no essential part of the deed, sealing being sufficient.

2 Co. 5 a, *Goddard's case*; *Noy*, 21, 85; *Moor*, 28; *Styl.* 97. {1} A scroll with a pen used as a seal is considered as a seal in Virginia; 1 Wash. 42, *Jones v. Logwood*. So in Pennsylvania. And an obligation with such a seal, executed and payable there, may be sued upon in New York as a sealed instrument; 2 Cain. 362, *Meridith v. Hinesdale*: though in that state such a scroll is not a seal, but a seal must be an impression on wax, or wafer, or some other tenacious substance capable of being impressed. 5 Johns. Rep. 239, *Warren v. Lynch*. See 1 Bos. & Pul. 360, *Adam v. Kers.* { (a) 2 Salk. 462, pl. 2, *Ld. Raym.* 335; 5 Mod. 281. β A party who signs and seals a bond, will be bound by it, though his name be not mentioned in the body of the instrument. *Beale v. Wilson*, 4 Munf. 380; *Bartley v. Yates*, 2 H. & M. 398; *Fulton's case*, 7 Cowen, 484; *Stone v. Wilson*, 4 M'Cord, 203; *Vanhook v. Barnett*, 4 Dev. 272; *Martin v. Dortch*, 1 Stew. 479; *Blakey v. Blakey*, 2 Dana, 463; *Smith v. Crooker*, 5 Mass. 583; *Campbell v. Campbell*, *Brayt.* 36; *Williams v. Greer*, 4 Hayw. 239. When the obligor signs and seals the bond between the penal part and the obligation, the latter is considered a part of the instrument. *Reed v. Drake*, 7 Wend. 345; and see 3 H. & M. 144. γ *Vide tit. Misnomer and Addition.*

And though the seal be necessary, and the usual way of declaring on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigil-*

## (C) Of the Ceremonies requisite to a Bond.

*latus* acknowledged, &c., yet, if the word *sigillat.* be wanting, it is cured by verdict and pleading over; for when he saith *per scriptum suum obligationum*, &c., all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation.

Dyer, 19 a; Cro. Eliz. 571, 737; Cro. Ja. 420; 2 Co. 5; Vent. 70; 3 Lev. 348.

Also, though sealing and delivery be essential to an obligation, yet there is no occasion in the bond to mention that it was (a) sealed and delivered; because, as my Lord Coke says, these are things which are done afterwards.

2 Co. 5 a. (a) So, an obligation is good though it want *in cujus rei testimonium*. Moor, 3; Leon. 25; 2 Co. 5 a. *See* Taylor v. Glaser, 2 S. & R. 502.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed. But herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth; and if a deed bear date one day, and be delivered at another, it was really dated when delivered, though the clause of (b) *gerens dat.* be otherwise.

2 Co. 5, Goddard's case; Noy, 21, 85, 86; Hob. 249; Styl. 97; Cro. Ja. 136, 264; Yelv. 193; Salk. 76. (b) A difference has been taken between *gerens dat.* and *cujus dat.*, that the first refers to the express date, but that *cujus dat.* is always intended of the real date, which is the delivery. 5 Mod. 285; Comb. 477; 2 Salk. 463; Ld. Raym. 335.

If a man declare on a bond, bearing date such a day, but do not say when delivered, this is good; for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was *primo deliberat.* at another day; for this would be a departure.

Cro. Eliz. 773; 3 Lev. 348; Salk. 141, pl. 7. *See* A bond delivered on the day of its date and accepted conditionally, to become absolute when the sufficiency of the sureties shall be certified by A, and afterwards A so certifies, this will make a valid delivery and acceptance from the date of the bond. Seymour v. Van Slyck, 8 Wend. 414. *See* Lockhart v. Roberts, 3 Bibb, 361.

But, if a bond bear date such a day, but was really delivered at a day after, the obligee may declare on a bond of such a date, but *primo deliberat.* at a day after; and if the obligee declare on a bond of such a date generally, the obligor may plead it was *primo deliberat.* on such a day after; but then he must traverse that it was delivered on the day of the date.

Brownl. 104; Lev. 196.

If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, viz., that it was delivered before the date, and it is a good deed from the delivery.

2 Co. 4, 6; 3 Keb. 332.

In debt on an obligation, the defendant pleads that he delivered it as an escrow, *et hoc puratus est verificare*: this is ill, for he ought to show to whom he delivered it, and conclude *assint nient son fait; et de hoc ponit se*, &c.

Vent. 9, 110; Salk. 274; pl. 1; 2 Ld. Raym. 803.

So, pleading that he delivered it to the obligee as an escrow, to be his deed on certain conditions, is ill; for, by the delivery of it to the obligee, it has become his deed absolutely.

Hob. 246; Vent. 9.



## (C) Of the Ceremonies requisite to a Bond.

|| But a bond left with a third person to be delivered to the obligee when he should agree to accept it, upon the terms on which it was made, is considered as an escrow to be delivered to the obligee on performance of the condition, and then takes effect from the original sealing and delivery; and although the obligor and obligee are both dead before the condition performed, yet upon performance of it the bond is good to charge assets.

Graham v. Graham, 1 Ves. jun. 274, citing Perryman's case; 5 R. 84 b, and Frosset v. Walshe, Bridg. R. 51, S. P.

But a voluntary bond, made only for a special purpose, without any condition, never delivered, but found amongst a man's papers after his decease, was set aside in equity.

Ward v. Lant, Prec. Ch. 182. β When the obligee has possession of the bond it is *prima facie* evidence of delivery. Clark v. Ray, 1 Har. & Johns. 323; Union Bank v. Ridgley, 1 Har. & Gill, 324.γ

So where B, on the marriage of his daughter, agreed by parol to make up her fortune to a certain sum, part of which he paid, and afterwards prepared a bond conditioned for payment of the residue, which, together with his will, he showed to the daughter and her husband, but never delivered it, and kept it in his own custody till his death; this was held void against creditors.

Loeffes v. Lewen and others, Prec. Ch. 370.||

A bond or deed may be delivered by words, without any act of delivery; as, where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c., so an actual tradition, without speaking any words, is sufficient; otherwise, a man that is mute could not deliver a deed. But (a) where, on an issue of *non est factum*, the jury found that the defendant signed and sealed the obligation, and laid it on a table, and that the plaintiff came and took it up, this was held not to be the defendant's deed, without other (b) circumstances found by the jury.

Co. Lit. 36 a; Cro. Eliz. 835. [That circumstances may amount to delivery, see Goodright v. Strahan, Cowp. 204.] (a) Leon. 193; Cro. Eliz. 122. (b) On an issue *non est factum*, the evidence was, that the obligation was written in a book, and that in the same leaf the defendant put his hand and seal thereto; and this was held to be sufficient evidence for the jury to find it his deed, which they having accordingly done, it was held good without question. Cro. Eliz. 613, Fox v. Wright.

|| Where the evidence was that the obligor had signed her name opposite to the seal, but the witness swore that she had neither sealed or delivered the bond in his presence; this was held evidence of a sealing and delivery to go to the jury.

Talbot v. Hodson, 7 Taunt. 251; S. C. 2 Marsh, 527.

And where the attesting witness to a bond, called to prove the execution, stated that he was not present when it was executed, other evidence was held admissible for that purpose.

Talbot v. Hodson, 7 Taunt. 251; S. C. 2 Marsh, 527; and Fitzgerald v. Elsee, 2 Camp. 634, which overrule Phipps v. Parker, 1 Camp. 412.||

If an obligation be delivered to another to the use of the obligee, and the same be tendered, and he refuse, the delivery has lost its force.

5 Co. 119 b. β But a bond cannot be delivered to the obligee or to one of several obligees as an escrow. Moss v. Riddle, 5 Cranch, 351. It may be delivered by a surety to the principal obligor as an escrow. Paulding v. United States, 4 Cranch, 219. The obligee of a bond, to whom it has been delivered by a person having no authority to do so, cannot maintain an action upon it. Fay v. Richardson, 7 Pick. 91. A bond is not binding unless it has been delivered to the obligee or his agent, although it was delivered to a third person for that purpose. State v. Oden, 2 Har. & Johns.

(D) Parties to the Bond. (*Who may be Obligors.*)

108, n. A paper signed and sealed in blank with verbal authority to fill it up, must be acknowledged or delivered, after it has been filled up, in order to be binding. *United States v. Nelson*, 2 Brock. 64; *Perminter v. M'Daniel*, 1 Hill, 267; *Gilbert v. Anthony*, 1 Yerg. 69; *Wynne v. Governor*, 1 Yerg. 149; *Ayres v. Harness*, 1 Ham. 368; but see contra, *Wiley v. Moor*, 17 S. & R. 438.g

[If A and B enter into a bond, and set but one seal to it, and A execute it for himself and B with the authority and in the presence of B, it is obligatory on both.

*Lord Lovelace's case*, Sir Wm. Jones, 268; *Ball v. Dunsterville*, 4 Term R. 313.]

¶And where a man agreed to be bound together with another in a bond, and sealed and signed it accordingly, but by the neglect of the clerk his name was not inserted, that defect was relieved against in equity.

*Crosby v. Middleton*, Prec. Ch. 237.¶

## (D) Of the Parties to the Obligation: And herein,

1. *Who may bind themselves, or be Obligors.*

ALL persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations.

5 Co. 119; 4 Co. 124; Roll. Abr. 340.

But, if a person is illegally restrained of his liberty, by being confined in a common jail or elsewhere, and during such restraint enters into a bond to the person who causes the restraint, the same may be avoided for duress of imprisonment.

Co. Lit. 253; 2 Inst. 482. Vide tit. *Duress*.

[If a man menace me unless I make him a bond for 40*l.*, and I tell him I will not do it, but will give him a bond for 20*l.*, the court will not expound this bond to be a voluntary one; for *non videtur consensum retinuisse, qui ex præscripto minantis aliquid mutavit*.

Bac. Reg. 22.]

So, in respect of that power and authority which a husband has over his wife, the bond of a feme covert is *ipso facto* void, and shall neither bind her nor her husband.

Vide tit. *Baron and Feme*, (M,) vol. ii.

So, though an infant shall be liable for his necessaries, such as meat, drink, clothes, physic, schooling, &c., yet if he bind himself in an obligation, with a (a) penalty for payment of any of these, the obligation is void.

*Doctor and Student*, 113; Co. Lit. 172; Cro. Ja. 494, 560; Sid. 112. (a) For this incapacity of an infant arises from his being incapable of contracting for any thing but for his benefit; but it can never be for his benefit to enter into a penalty. Cro. Eliz. 920. ¶And although he confirm it after twenty-one, still it is invalid unless the confirmation be of as high authority as the bond itself. *Baylis v. Dineley*, 3 Maul. & S. 477.¶ Vide head of *Infancy and Age*.

Also, though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, because no man can be allowed to stultify himself, because of the ill consequences that might attend counterfeit madness, yet may a privy in blood, as the heir; and privies in representation, as the executor and administrator, avoid such bonds. Also, if a lunatic, after office found, enters into a bond, it is merely void.

4 Co. 124, *Beverly's case*. Vide head of *Idiots and Lunatics*. [Modern cases consider the bond of a lunatic as absolutely void; and the obligor himself may, on *non est factum*, give lunacy in evidence. *Yates v. Boen*, 2 Stra. 1104. A bond may be

(D) Parties to the Bond. (*Who may be Obligees.*)

avoided in like manner by reason of excessive drunkenness at the time of executing it. *Cole v. Robins*, Bull. N. P. 179.]  $\beta$  A bond executed by the executor while in a state of drunkenness may be avoided; but if, on becoming sober, he retain what he received in consideration, he will be held to have confirmed it. *Williams v. Inabnet*, 1 Bailey, 347; *Guy v. M'Lean*, 1 Dev. 47. See *Barrett v. Buxton*, 2 Aik. 167; *Burroughs v. Richman*, 1 Green, 233; *Taylor v. Patrick*, 1 Bibb, 168; *White v. Cox*, 3 Hayw. 82; *Curtis v. Hall*, 1 South, 361; *Lee v. Ware*, 1 Hill, 313; *Wade v. Colvert*, 2 Rep. Const. Ct. 27; *Fort v. Tewkesbury*, 2 Verm. 97. $\gamma$   $\parallel$  But a court of equity will not assist a person who wishes to get rid of a deed merely on the ground of his having been intoxicated at the time, unless an unfair advantage were made of his situation, or unless there were some contrivance or management to draw him in to drink. *Cooke v. Clayworth*, 18 Ves. 15; *Cory v. Cory*, 1 Ves. 19; and see 3 P. Wms. 130, note (a.) $\parallel$

But if an infant, feme covert, (a) monk, &c., who are disabled by law to contract and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c.

Roll. Rep. 41.  $\parallel$  (a) A feme covert having given a bond for payment by her executors, of money advanced on security of her bond, to her son-in-law, promised after her husband's death that her executors should pay the bond; held, that her executors might be sued in *assumpsit* on such promise. *Lee v. Moggeridge*, 5 Taunt. 36. $\parallel$   $\beta$  On being inquired of a party, acknowledged his signature to the instrument, without stating that he did not hold himself bound; held that this was sufficient to bind the party. *Byers v. McClanahan*, 6 Gill & Johns. 250; and see *Manpin v. Whiting*, 1 Call, 324. $\gamma$

If a servant make a bill in this form, *Memorandum, that I have received of Ed. Talbot, to the use of my master, Serjeant Gaudy, the sum of 40l. to be paid at Michaelmas following*, and thereto set his seal, this is a good obligation to bind himself; for though in the beginning of the deed the receipt is said to be to the use of his master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against Serjeant Gaudy.

Yelv. 137, *Talbot v. Godbolt*.  $\beta$  See *Couch v. Ingersoll*, 2 Pick. 292. A bond signed "A" (L. S.) "for B, C and D," is the bond of A B, and D, although one seal only is used. *Martin v. Dortch*, 1 Stew. 479. $\gamma$

2. *Who may take such Security, or be Obligees.*

Infants, idiots, as also a feme covert, may be obligees. And as to this the husband is supposed to assent, being for his advantage: but if he disagrees, the obligation has lost its force; so that after the obligor may plead *non est factum*. But if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is a turn to his advantage.

5 Co. 119 b; Co. Lit. 3 a.

But a feme covert can neither be obligor nor obligee to her husband, nor *vice versa*, being but one person in law. Also, by the better opinion, a bond entered into, to a feme sole, by the person whom she afterwards marries, is, by the marriage at law, (b) extinguished.

But for this vide tit. *Baron and Feme*, letter (E).  $\parallel$  (b) A bond given by the husband to the intended wife prior to marriage, conditioned for payment of money to her after the obligor's death, is not extinguished by the coverture; and such a bond may be enforced at law against the heirs of the husband. *Milbourn v. Ewart*, 5 Term R. 381; *Cage v. Acton*, 1 Ld. Raym. 515.]

An alien may be an obligee; for since he is allowed to trade and traffic with us, it is but reasonable to give him all that security which is necessary

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in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us.

Co. Lit. 129 b ; Moor, 431 ; Cro. Eliz. 142, 683 ; Cro. Car. 9 ; Salk. 46, pl. 1 ; Ld. Raym. 282. Vide head of *Alien*.

Sole corporations, such as bishops, prebendaries, parsons, vicars, &c., cannot be obligees, and therefore a bond made to any of these shall inure to them in their natural capacities ; for no sole body politic can take a chattel in succession, unless it be by (a) custom. But a corporation aggregate may take any chattel, as bonds, leases, &c., in its political capacity, which shall go in succession, because it is always in being.

Cro. Eliz. 464 ; Dyer, 48 a ; Co. Lit. 9 a, 46 b ; Hob. 64 ; Roll. Abr. 515. (a) As, the Chamberlain of London, whose successor, by custom, may have execution of a bond or recognisance acknowledged to his predecessor for orphanage money. 4 Co. 65 ; Cro. Eliz. 664, 682. β A bond given to a committee of an ecclesiastical society and their successors, may be sued upon in the name of the successors of such committee after they have been removed from office. *Bailey v. Lewis*, 3 Day, 450.g

β A bond made by an obligor to a class of persons, as to the justices of a county, if the obligor be himself a justice, is void, because a man cannot be obligor and obligee in the same contract.

*Justices v. Bonner*, 3 Dev. 289 ; *Justices v. Armstrong*, 3 Dev. 284 ; *Justices v. Dozier*, 3 Dev. 287 ; *Davis v. Somerville*, 4 Dev. 382.g

3. *Who shall be said the Obligee ; and therein of making several Obligees.*

If A, by his bill obligatory, acknowledges himself to be indebted to B in the sum of 10*l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20*l.*, but does not mention to whom he is bound, yet is the obligation good, and he shall be intended to be bound to B to whom he acknowledged before the 10*l.* is due.

2 Roll. Abr. 148 ; *Franklin v. Turner*. [The *solvendum* will show to whom bound, though the obligee's name be omitted in the preceding part of the instrument. *Langdon v. Goole*, 3 Lev. 21 ; *Lambert v. Branthwaite*, 2 Str. 945.]

If A enters into an obligation to B, which he delivers to C to the use of B, though this immediately, upon the execution and delivery to C, becomes the deed of A, yet if, after it is presented to B, he (as he may) disagrees to it *in pais*, by such refusal the obligation (b) loses its force.

Dyer, 167 a, *Taw's case* ; N. Bendl. 75 ; Co. Ent. 145 ; Roll. Abr. 148, and Salk. 301, S. C. cited. (b) In 3 Co. 26 b, where my Lord Coke cites this case, he says, that peradventure in an action brought on the bond, A cannot plead *non est factum*, because that it was once his deed.—But in 5 Co. 119 b, he says, that in such case the obligor may plead *non est factum*, in regard the obligation, by the refusal of the obligee, loses its force.

Though there may be several obligees, yet a person cannot be (c) bound to several persons severally ; and therefore an obligation of 200*l.* to two, *solvend.* the one hundred pounds to the one, and the other to the other, is a void *solvend.*

Dyer, 350 a, pl. 20 ; Hob. 172 ; 2 Brownl. 207 ; Yelv. 177. (c) But a man may covenant with two severally, for that sounds only in damages. March, 103.

A bond was worded in the words following: *Be it known, that I, A, do acknowledge myself to owe and be indebted to B and C in the sum of 91*l.* 12*s.* 8*d.*, for which payment to be made I bind myself to B in 100*l.* ; and whether B alone should bring the action for the 100*l.*, or both should join in an action for the 91*l.* 12*s.* 8*d.*, dubitatur et adjournatur.*

Cro. Ja. 251, *Foxall v. Sands*.

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If an obligation be made to three to pay money to one of them, they must all join in the suit, for they are but as one obligee; and if he to whom the money is to be paid dies, the others must sue, although they have no interest in the sum contained in the condition.

Yelv. 177.  $\beta$  At common law, an action on a bond can be maintained only by the obligee or his legal representatives; a bond given to A, conditioned for the support of B, cannot, therefore, be sued in the name of B. *Sanford v. Sanford*, 2 Day, 559; *Sanders v. Filley*, 12 Pick. 554. $\gamma$

So, if an obligation be made to three, and two bring their action, they ought to show the third is dead.

Sid. 238, 420; Vent. 34;  $\beta$  *Ehle v. Purdy*, 6 Wend. 629. $\gamma$

If A bind himself in a sum to B, *solvendum* to C, who is a stranger, to the use of B, a payment to C is a payment to B, and in an action upon it the count must be upon a bond *solvendum* to B.

*Queen mother v. Challoner*, Sid. 395; 2 Keb. 81. [In this case the court only inclined to the opinion here stated; there was no determination; the matter was adjourned.—As courts of law now take notice of trusts, the defendant may plead, that the nominal obligee in the bond is not the real owner of it, but merely a trustee for another, and so entitle himself to set-off a debt due from the *cestui que* trust to him. *Rudge v. Birch*, Mich. 25 G. 3, B. R. *Bottomly v. Brook*, Mich. 22 G. 3, C. B., 1 Term R. 621, 622.  $\parallel$  But Lord Ellenborough said, he was inclined to restrain, rather than extend, this doctrine; and accordingly the Court of King's Bench held, that a defendant could not set-off against the plaintiff's demand a bond given by plaintiff to A B, and assigned by him to defendant. *Wake v. Tinkler*, 16 East, 36; and see 7 East, 153. $\parallel$

In debt the declaration was, that the defendant became bound in a bond of ——— for the payment of ——— to him, his attorney or assigns, and on oyer of the bond it appeared, that the *solvendum* was to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance it was held good; and that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon.

6 Modd. 228; *Robert v. Harnage*, Lord Raym. 1043; 2 Salk. 659, pl. 5.

So, if A make a bond to B, *solvendum* to such person as he shall appoint; if B does appoint one, payment to him is a payment to B, and if B appoint none, it shall be paid to B himself.

6 Mod. 228.  $\parallel$  Vide tit. Condition, (P) 2. $\parallel$

4. *Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.*

It is clearly agreed, that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case the obligee may sue them all jointly, or he may sue any one of them, at his election; but if they are jointly and not severally bound, the obligee must sue them jointly. Also, in such case, if one of them dies, (a) his executor is totally discharged, and the survivor and survivors only chargeable.

2 Roll. Abr. 148; *Dyer*, 19, 310; 5 Co. 19; *Dalis*. 85, pl. 42; *Salk*. 393, pl. 2; *Carth*. 61; *Lutw*. 696.  $\beta$  When one of several partners makes a bond in the name of the firm, and with one seal only, this is the bond of the partner who signed it. *Button v. Hampson*, *Wright*, 93. See *Curd v. Forts*, 2 Marsh. 119. $\gamma$  (a) If two are bound jointly, and one dies, the survivor only is liable in equity; but it is otherwise, if they were bound jointly and severally. 2 Vern. 99.  $\beta$  See *Waters v. Riley*, 2 Harr. & Gill. 305; *Preston v. Preston*, 1 Harr. & Johns. 366. In Tennessee, the statute authorizes a joint action against the survivor and the representatives of a joint obligor. *Claiborne v. Goodloe*, *Cooke*, 391. In debt against one obligor only, on a joint bond, the declaration ought to state that the other obligor is dead, and the omission to do so is a fatal error, not cured by verdict. *Newman v. Graham*, 3 Munf. 187. $\gamma$

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{A executes a bond as the joint and several bond of himself and his partner B, and signs it "A and B," having no authority from B so to do. The bond is good as the several bond of A. So if the bond is joint {1} in terms.

2 Bos. & Pul. 338, *Elliott v. Davis*. {1} 2 Cain. 254, *Green v. Beals*.

So, a bond executed by several in these words, "*We are holden and bound unto M C in the sum of 500 dollars, for the payment of which we bind ourselves, and each of us,*" is joint and several.

2 Day, 442, *Carter v. Carter*.}

[But this is true only of the remedy at law, and not of that in equity. It is true, that from the form of the contract, the remedy *at law* is gone; but *in equity* both are considered as having undertaken to pay, and if the obligee cannot recover against the one, he shall against the other. This will appear from the following cases.

1 Br. Ch. R. 29.

Nutt and Baker, partners in trade, borrowed on their joint bond: Nutt died; Baker, the surviving partner, became bankrupt: the plaintiff, as executor of the bond-creditor, proved his debt, received satisfaction, in part, and brought a bill against Vaughan, as executor of Nutt, to have the deficiency supplied out of his assets. Lord Hardwicke held, that it was a sum lent to both, of which both had the advantage: and a debt arose against both from the nature of the transaction: it was no lien on the partnership in particular, because the plaintiff might have had it against either of them. There was farther in this case reasonable evidence of fraud or mistake, for Baker filled up the bond.

*Simpson v. Vaughan*, 1740, cited in 2 Ves. 101.

Owen and Church, partners in trade, borrowed from Bishop, at two different times, two sums of 1000*l.* each; for which they gave two bonds, binding themselves, and their heirs, executors, and administrators, with condition, that if they or either of them, their or either of their heirs, executors, or administrators, &c. Church broke off the partnership, and died in 1740. Bishop died in 1747; and his representatives, Owen becoming bankrupt, brought a bill against the representatives of Church for a satisfaction of this debt out of the real and personal assets. Lord Hardwicke set up the bond both against the personal representatives and the heir of Church. His lordship said, the bond is considered as an agreement in writing; and therefore, though the obligation and penalty are gone by the legal demand being gone, yet the condition, taking it altogether, is considered as an agreement in this court to pay the money, and as an agreement under hand and seal: therefore the court will set it up against executor and heir.

*Bishop v. Church*, 2 Ves. 100, 371.

If an obligee in a bond make any variation in the original contract with the principal without the privity of the surety, as, if he change the nature of the security, or agree to postpone the day of payment, he thereby discharges the surety. It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor.

*Milp v. Hony*, 3 Atk. 91; *Nisbet v. Smith*, 2 Br. Ch. R. 579; *Rees v. Barrington*, 6 Van. Jun. 540; *Houltsbee v. Stubbs*, 18 Ves. 20; *Eyre v. Barthrop*, 3 Madd. 231; *Hurke's Case*, cited 2 Bos. & Pul. 62; *Bank of Ireland v. Beresford*, 6 Dow. P. C. 233;

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and vide *Law v. East India Company*, 4 Ves. 824.] *β* See *Dewey v. Bradbury*, 1 Tyler, 186; *Love v. Shoape*, Walker, 508.*g*

¶But the sureties in a bond conditioned for the principal obligor's accounting and paying over, from time to time, all such tolls as he should collect for the obligees, were held not discharged *at law* by the *laches* of the obligees, in not properly examining the principal accounts for eight or nine years, and not calling upon him for payment so soon as they might have done, for their conduct did not amount to an *estoppel at law*, whatever remedy there might be in equity.

The *Trent Navigation Company v. Harley*, 10 East, R. 34; and see 14 East, R. 510; 4 Moore, 153.

Nor is it any defence *at law* to an action upon a bond against a surety, that, by parol agreement, time has been given to the principal, for the bond, being a specialty, cannot at law be discharged by such *parol* agreement.

*Davey and others v. Prendergrass*, 5 Barn. & A. 187.

If the creditor enters into a *binding contract* with the principal debtor, to give him further time to pay, without concurrence of the surety, the surety is discharged, because the creditor (*a*) has put it out of his own power to enforce immediate payment when the surety would have a right to require him to do so.

*Bank of England v. Beresford*, 6 Dow. P. C. 238; *Samuell v. Howarth*, 3 Meriv. 272; *Orme v. Young*, Holt, Ca. 84. (*a*) This is equally the doctrine of courts of law and of equity. Where the security is by *simple contract*, there is no objection to the surety setting up the indulgence given to the principal, as a defence to an action in a court of law; as is done in the case of actions against drawers and endorsers of bills of exchange, where time has been given, without their assent, to the acceptor. But where the surety is bound by a security of so high a nature that *at law* it cannot be discharged by a mere parol agreement to give time, (as in the case of bail who are bound by recognisance, sureties in replevin bonds, and all other specialty contracts,) in those cases it becomes necessary for the surety to apply by motion to the equitable jurisdiction of the common law court, (as in the case of bail or replevin sureties,) or to a court of equity in the case of other specialties, in order to have the benefit of a doctrine which, in those cases, cannot be enforced by the ordinary forms of pleading. See *Davey v. Prendergrass*, *ubi sup.*]

If three enter into an obligation, and bind themselves in the words following, *Obligamus nos et utrumque nostrum per se pro toto et in solido*; these make the obligation joint and several.

*Dyer*, 19 b, pl. 114.

So, where two bound themselves, or any of them, their heirs, executors, or either of their heirs, &c., and the obligation was sealed and delivered by both of them jointly; this was held to be a joint and several, and not a joint bond only; and that the word *vel* should be understood the same as *et*; and that therefore the joint delivery and acceptance could not make that joint only, which by the words was joint or several, at the election of the obligee.

*Cro. Ja.* 392, *Hawkinson v. Sandilans*.

¶So where A and B, partners, became jointly bound to C, conditioned that if A and B, their heirs, executors, or administrators, or any of them, should well and truly pay, &c., the bond was held joint and several.

*Thomas v. Frazer*, 3 Ves. 399.]

If two jointly and severally bind themselves in an obligation, which they severally deliver at different times and places, yet is the obligation joint or several, at the election of the obligee.

8 H. 6, 31; 2 Roll. Abr. 149.

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If three are bound in a bond by these words, *Obligamus nos et quemlibet nostrum conjunctim*; this is a joint obligation, and one of them alone cannot be sued; (a) for the word *conjunctim* makes the obligation joint, which the word *quemlibet* cannot make several; being inserted for no other purpose but to express more strongly that they should be all bound, not that they were to be severally bound.

Moor, 260, pl. 407; 3 Leon. 206, Wigmore v. Wells; [Spencer v. Durant, 1 Show. 8, S. P. (a) But if one is sued, he must take advantage of it by pleading in abatement; for if he demandsoyer, and demurs, the plaintiff shall have judgment; for the court will presume that the other never sealed it. Gilbert v. Bath, 1 Stra. 503. They will presume the like, unless the plea state that the other actually did seal it. Hollingworth v. Ascue, Cro. Eliz. 355.]

|| But a joint bond was held joint and several against creditors in the administration of assets where the intention of the parties was admitted, and was decreed to be paid as a specialty debt, out of the estate of one of the obligors.

Burn v. Burn, 3 Ves. 573; *Ex parte Symonds*, 1 Cox, 275.

Davis executed a bond as the joint and several bond of himself and Marsh, and signed it *Davis and Marsh*, having no authority from Marsh so to do: it was held good as the *several* bond of Davis: for the sealing and delivery is sufficient alone without signature; and if it had been necessary, the court would have held Davis to have described himself "Davis and Marsh," and to be estopped from showing that his name was Davis only.

Elliot v. Davis, 2 Bos. & Pul. 338.]

If by indenture between three on the one part, and two on the other, the two covenant jointly and severally to perform a certain act, and the three likewise covenant jointly and severally with the said two, that, after the performance of the said act, they will pay the said two a certain sum of money, &c., and then follow these words, viz., *Pro vera et reali performance omnium articulorum et agreementorum predictorum alternatim una partium predictarum obligavit se, heredes, executores, administratores, et assignatos suos, in et subter penalitatem sexaginta librarum sterlingarum*; an action of debt for the 60*l.* on this last clause cannot be brought against one of the three only, being only joint, and not joint and several, like the precedent covenant.

9 Rull. Abr. 149; adjudged by three judges against Rolle, who held it to be joint and several; and of that opinion, he says, were divers of the judges and sergeants, at the table in Nerjeant's Inn in Fleet Street, on its being proposed to them.

Although two or more may bind themselves jointly, or jointly and severally, in which case the obligee may sue them all jointly or severally, at his election; yet, if three or more bind themselves jointly and severally, the obligee cannot sue two of them (b) only jointly.

10 H. 7, 10; Yelv. 96; Sid. 238; {1 Hen. & Mun. 61; Leftwich & others v. Herkley.} (a) Unless it appear to the court that the other persons are dead. Hard. 198; Cro. Eliz. 401; Mand. 291; Sid. 238, 490; Allen, 21, 41; Lutw. 696; Cro. Ja. 152; Kelh. 210, 230.

Also, if two be bound in a bond jointly, and one be sued alone, though he may plead this matter in abatement of the writ, yet he cannot plead *non est factum*; for it is his deed, though not his sole deed.

Cro. Eliz. 401; 1 Cro. 119, Whelpdale's case; Doct. Pl. 198; Cro. Ja. 152; Vent. 111; Brough. 101; 1 Cro. 110. (b) On a joint bond, and not joint and several, at common law, the remedy survives against the surviving obligor only, and his legal representatives. Watson v. Riley, 9 Har. & Gill, 305.g



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And therefore in debt against one, on an obligation wherein two are jointly bound, after imparlance and oyer, the defendant cannot plead that the other sealed and delivered; for as that must come on the defendant's side, and it is too late to plead it after imparlance, it shall be taken, that the other did not seal, &c., nor will the oyer help it, for it does not appear by it, without special averment. But of (a) records oyer is sufficient without averment.

Vent. 76, 135; 2 Keb. 795. (a) And therefore in a *scire facias* brought against three baillees or sureties, upon a recognisance acknowledged by them and the principal jointly and severally; on demurrer the writ abated, because, this being founded upon a record, the plaintiff ought to set forth the cause of the variance from the record; as, that one was dead. But, if an action be brought upon bond in the like case, there the defendants ought to show that it was made by them and others in full life not named in the writ; because the court shall not intend that the bond was sealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered *in hæc verba*. Allen, 21, Blackwell v. Ashton.

So, in debt against one, on a bond wherein two are jointly bound, after oyer the defendant demurred, and the plaintiff had judgment; for though another be named in the bond, yet it does not appear, without averment, that he sealed, and then the bond is single; but it ought to have been pleaded in abatement.

Saund. 291; Sid. 420, Cabel v. Vaughan.

Also, if two or more be jointly bound, though, regularly, one of them alone cannot be sued, yet, if process be taken out against all, and one of them only appear, but the other stand out to an outlawry, he who appeared shall be charged with the whole debt.

9 Co. 119 a, in Whelpdale's case. *β* In an action on a joint and several bond, when some of the defendants only are served with process, it is immaterial whether the declaration be against all the obligors, or only against those on whom the process has been served, but the bond must be properly described. Moss v. Moss, 4 H. & M. 293.g

If two are jointly bound, and there is judgment against both, execution likewise must be taken out against both, and must be of the same nature: also, if two are jointly and severally bound, and there is judgment in a joint action against both, the execution must be joint against both, and of the same nature; so that you cannot take out a *capias* against one, and an *elegit*, &c. against the other; for though the plaintiff might have sued them severally, yet by suing them jointly he has made his election, and the execution must ensue the nature of the judgment; and though they be several persons, yet they make but one debtor, when J S sues them jointly. But if the obligee sues them severally, he may sever them in their kinds of execution; for though the obligation be but one, yet the originals, suits, pleadings, judgments, and executions, are as different as if they were upon several obligations.

Hob. 59; Cro. Eliz. 648; 2 Sid. 12; Mod. 2; Roll. Abr. 888, 889.

But, if there be a joint judgment against two, and one die, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (b) common law, the charge upon a judgment being (c) personal survived; and the statute of Westm. 2, 13 Ed. stat. 1, c. 45, that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*. But, if he should, after the allowance of this writ and revival of the judg-

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ment, take out an *elegit* to charge the land, the party may have remedy by (d) suggestion, or by *audita querela*.

Raym. 26; Lev. 30; Keb. 92, 123, S. C., Edsat v. Smart. (b) So adjudged 1 E. 3, 13, pl. 41; 3 E. 3, pl. 37; and see 29 Ass. pl. 37; 29 E. 3, 29. (c) For the difference between a real and personal execution, and that a personal execution will survive, though a real will not, vide 3 Co. 14; Yelv. 202; Raym. 153; 2 Keb. 3, 331; 4 Mod. 315; 3 Keb. 295; Salk. 319, pl. 3; Ld. Raym. 44; Comb. 441; 5 Mod. 338; Carth. 320, 404; Show. 402. (d) For this vide F. N. B. 166; 44 E. 3, 10.

If two are bound in an obligation jointly and severally, and judgment given against each in two several actions, one *in Banco*, the other *in Banco Regis*, and after one is taken in execution *in Banco Regis*, and after an execution is taken *in Banco* against the other by *elegit*, and lands and goods (a) delivered in execution thereupon; he, that is in execution by his body *in Banco Regis*, shall be delivered upon an *audita querela*, because the execution upon an *elegit* is a satisfaction.

Hob. 2; Cro. Ja. 338; 2 Bulst. 97, &c.; Godb. 257; Roll. Rep. 8, 9, S. C., adjudged between Crawley and Lidgate. (a) But if, after execution of *elegit*, the judgment *in Banco* is reversed, perhaps the other shall not have an *audita querela*; per Croke, *contra* Doddridge; 2 Bulst. 100.—And my Lord Coke says, that if upon an *audita querela* the other be once discharged, although afterwards the judgment *in Banco* be reversed, yet he shall not be taken in execution again. Roll. Rep. 10; 2 Bulst. 101.

If A and B are bound in an obligation jointly and severally, and judgment given against each upon several actions brought, and both taken in execution, and after A escapes, yet B shall not be delivered upon an *audita querela*; for though the obligee may have an action against the sheriff for the escape, yet, till he is actually satisfied, the other shall not have an *audita querela*, nor the obligee be compelled, whether he will or no, to take his remedy against the sheriff, who may die or be insolvent.

5 Co. 86; Cro. Eliz. 478, 479, 555; Co. Ent. 85, vide tit. *Escape*.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is (b) a release of the debt, and the executor cannot sue the other obligor.

8 Co. 136; Salk. 300; and vide Jon. 345; [acc. 1 Bos. & P. 630.] (b) But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains assets in his hands, to pay both debts and legacies. Cro. Car. 373; Yelv. 160, and vide tit. *Evidence*, letter (G).

A and B were jointly bound to J S, who made the wife of A executrix, and died; A and his wife brought debt against B, who pleaded this matter in abatement; it was argued by Serjeant Turner, for the defendant, that by making the wife of one of the obligors executrix, the other obligor is discharged. Hob. 10, Fryer v. Gildridge, 21 E. 4, 81 b; Bro. Exec. 118. And that it would be so, if they were bound jointly and severally. Plow. 38 a, Platt's case; Keilw. 63; 8 Ed. 4; 3 Bro. Debt. 156. The reason is, because a debt, or personal thing, once suspended is gone for ever; and here the plaintiff, one of the obligors, is discharged, for he and his wife cannot sue himself; and of that the other shall take advantage. Dyer, 140; Co. Lit. 264 b. It is a release in law, of which his companions shall take advantage notwithstanding the opinion 21 H. 7, 37. But if it was but suspended for the time of the executorship, yet it is for the defendant, having pleaded in abatement. 11 H. 7, 4 b; 1 Roll. Abr. tit. *Extinguishment*, 940; Moor, 855, pl. 1174; 1 Cro. Dorchester v. Webb, 272; Yelv. 160; Flud v. Ramsey, 8 Co. 136, *Per cur.*—The plea being pleaded in abatement, it is for the defendant; for during the coverture and executorship there

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is a suspension of the debt. But it was agreed, that this debt due by the baron was assets in his hands, and liable to the creditors, though it should be adjudged an extinguishment; for as North said, this is a release, but it is but by will; and therefore in nature of a legacy, which shall not be preferred to a debt. But it was doubted, if it had been pleaded in bar, if it should be for the defendant; and North, Ellis, and Windham thought not; but that, after the death of the baron, it might be sued for; for the suspension is but during the coverture, and the baron is executor only in right of his wife; but of this Atkyns doubted. But in the principal case there was judgment for the defendant.

Hammond et ux. v. Bendish, Pasch. 26 Car. 2, Rot. 712.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act.

2 Co. 136 a, March, 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied; for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non*, &c., of the obligee can ever sue the surviving obligor.

Hob. 10.

But, if two are bound jointly and severally to A, and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor.

2 Lev. 73.

If two are jointly and severally bound in an obligation, and the obligee releases to one of them, both are discharged.

Co. Lit. 232 a, [26 H. 6, T. Barre, 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. *Nota*, each was bound in the entirety, therefore it was joint and several. 34 H. 6. So in the case of the king, if he releases to one of the obligors, the other shall take advantage. 5 Rep. 56, *contra*.—And as a release in deed to one obligor discharges the other, so of a release in law, as 8 Rep. 136, Needham's case. A woman obligee marries the obligor, that is another sort of discharge. But in 17 Car. 2, B. R., two were bound jointly and severally. The plaintiff sued both, and afterwards entered a *retraxit* against one; whether that discharged the other was the question? Berkley said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in Hickmot's case, 9 Rep.; and *retraxit* is a bar to an action; and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Co. Inst. *contra*; for a *retraxit* is only in nature of an estoppel, and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21 H. 6, it is said, that there must be an actual release to one obligor to discharge the other. See March's R. 165.—Pasch. 18 Car. Hannam v. Roll. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action on the case the matter was found specially; and Rolle argued, that the debt was not absolutely discharged, but only *sub modo*, viz.: if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient. See Hob. 70, Parker v. Sir John Lawrence. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a *nolle prosequi* against the two others; it was held to be no discharge to him against whom judgment was had; for as to him the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a *nolle prosequi*, or nonsuit before judgment against one, would discharge it. Lord Nott. MS. Co. Lit. 232 a, note (i), last edit.]

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¶ But the release must be express, and not merely a constructive release. Therefore a covenant not to sue one of the obligors, and that, if sued, the covenant shall be an effectual release, and may be pleaded in bar, does not release the other obligor; for although a covenant not to sue a sole obligor operates as a constructive release, yet that is only in order to prevent circuitry of action, and not because the covenant is to all effects the same as an express release. Therefore it has not the same effect as to another obligor to whom the covenant does not apply.

Dean v. Newhall, 8 Term R. 168; Hutton v. Eyre, 6 Taunt. 289; 1 Ld. Raym. 690; 12 Mod. 551; and vide Solly v. Forbes, 2 Brod. & B. 38.]

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleads, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon demurrer it was adjudged, that the obligation by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were (a) severally bound.

2 Lev. 220; Seaton v. Henson; 2 Show. 28, pl. 20, S. C. adjudged *nisi*. (a) Where several merchants covenanted *separatim*, and the seal of one of them was torn off, it was held, that this should avoid the covenant as to him whose seal was torn off only, but not as to the others. 5 Co. 23, Matthewson's case; March, 126, S. C. cited, and a difference there taken between a bond and a covenant.

So, where three were bound in a bond jointly and severally, and the seals of two were eaten by the rats, the court inclined, that the bond was void against all.

March, 125, Bayly v. Garford; 2 Show. 29, S. C. cited, as adjudged to have been void. ¶ Tearing off the seal of a bond by the obligor fraudulently, or innocently, without the obligee's consent, does not avoid the bond. Cutts v. United States, 1 Gallis. 69; United States v. Spalding, 2 Mason, 478; and so tearing off a seal from a deed for the conveyance of land, does not vitiate it. Rees v. Overbaugh, 6 Cowen, 746. See 5 Conn. 540; 2 Halst. 175; 5 Harr. & Johns. 36; 8 Cowen, 71; 10 Conn. 192; Paine, 336; Coxe, 447.g

But, where two were bound jointly and severally, and it was found by special verdict, that after issue joined, and before the *nisi prius*, the seal of one of the obligors was taken off the bond; it was held, that this being after issue joined, the bond was good.

Owen, 8, Michael's case; Dyer, 59, pl. 12, 13; S. C. and S. P. where the jury were directed to try, whether it was his bond at the time of the plea pleaded.

If A be bound in a bond for payment of money, and B be bound with him, as his surety only, and the bond happen to be lost; equity will set up the bond, as well against the (b) surety as against the principal, because the bond was once a legal charge against both.

Abr. Eq. 93, Sheffield v. Lord Castleon; {9 Ves. J. 464, East India Co. v. Boddam.} (b) Especially, if the money was lent principally upon the surety's credit. Chan. Ca. 77; and vide 2 Chan. Ca. 22; Vern. 196.

In equity, a bond creditor shall have the benefit of all counter-bonds or collateral securities given by the principal to the surety; as, if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt.

Abr. Eq. 93, Maure v. Harrison.

A bond made to secure a just debt, payable with lawful interest, shall not be avoided by reason of usury, or any corrupt agreement between the obligors, to which the obligee was no way privy; as, where A being indebted to B in 100*l.*, agrees to give him 30*l.* for the forbearance of that 100*l.* for a

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year, and gives him a bond of 60*l.* for payment of the 30*l.*, and for the payment of the 100*l.* enters into a bond of 200*l.* together with B for the payment of a true debt of 100*l.* due from B to C.

And. 121; Moor, 752, pl. 1035; Cro. Ja. 32, 33; Yelv. 47.

## 5. Of their Remedies against each other.

If one of the sureties pays all the bond, yet the obligee is not compellable by law to assign the bond to him, but the surety's remedy must be in (a) Chancery.

(a) Or perhaps he may have remedy by writ *De plegiis acquiescendis*. Lev. 72. [Qu. Whether not in an action for money paid to the other's use?] [It is clear that such an action lies. Vide page 258.]

And on this foundation, that there is a remedy in equity, it hath been adjudged, that if A together with B is bound to C for the proper debt of B; &c., and A pays the money, and B dies, and makes D his executor, and D, in consideration that A will forbear to sue him till such a time, assumes and promises to repay him; this consideration is good, though D was liable in equity only. (b)

Sid. 89; Lev. 71, Scot and Stevens; Roll. Rep. 27, S. P. per Croke. (b) Why was not D liable at law as executor, for money paid by plaintiff, for the use of testator? [It is now clear law that he would be so liable. It was formerly doubted whether *indebitatus assumpsit* would lie by a surety against his co-obligor, the principal debtor. Woffington v. Sparks, 2 Ves. 570. Yet, in that case, an assignment of the bond to the surety was refused, on the ground that, *having no counter-bond*, he might have paid the bond, and maintained a special action upon the case against the principal for the money: and it is now clear, that where one person is surety for another, and is called upon to pay, it is *money paid to the use of the principal debtor*, and may be recovered as such in an action against him. Exall v. Partridge, 8 Term R. 310. Provided the surety have taken no security from the debtor. Toussaint v. Martinaut, 2 Term R. 105; Cowley v. Dunlop, 7 Term R. 568; and see Maxwell v. Jameson, 2 Barn. & A. 51. The point appears to have been first decided by Lord Mansfield, in Decker v. Pope, 1 Selw. N. P. 74, n. 27. This was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the price of some goods sold to defendant; and the surety having been obliged to pay the money, the administrator declared against defendant for so much money paid to his use: Lord Mansfield directed the jury to find for the plaintiff; observing, that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, he had conferred with most of the judges upon it, and they agreed in that opinion.]

Also, it is held clearly in equity, that one surety may compel another to contribute towards payment of a debt, for which they were jointly bound.

Chan. Ca. 246; Chan. R. 34, 120, 150; {6 Ves. J., 805, *Ex parte Gifford*.}

[And whether jointly or jointly and severally bound, or whether severally bound by the same or by different instruments, sureties have a common interest and a common burden.

2 Bos. & Pul. 273. β When a bond is written as if two sureties were to execute it, and it is executed by one only, he will not be bound unless it be proved he dispensed with the execution by the other. Sharp v. United States, 4 Watts, 21.]

Where bound by different instruments for the same principal, they are as effectually bound, *quoad* contribution, as if bound in one, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same instrument they must contribute equally.

Deering v. Earl of Winchelsea, 2 Bos. & Pul. 270; 1 Cox, 318. Where a surety

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joins with his principal in a bond, and no other security is executed, and the surety pays the bond, he is only a simple contract creditor of the principal. *Copis v. Middleton*, 1 Turner, R. 224.

And on a bill by a surety against his co-surety *and the principal*, for a contribution in respect of money actually paid by plaintiff for the principal, it is not necessary to prove the insolvency of the principal; but it is otherwise where the principal is not a party.

*Lawson v. Wright*, 1 Cox, 276; and see *Ibid.* 322.

So, one of several co-sureties in a bond may recover against any one of the others *his aliquot proportion* of the money paid by him, regard being had to the number of the co-sureties; and this, *perhaps*, although neither the insolvency of the principal nor of any of the co-sureties were proved.

*Cowell v. Edwards*, 2 Bos. & Pul. 269; but see 1 Cox, 318.

But it seems no more than an *aliquot part* of the whole can be recovered *at law*, though if the insolvency of all the other parties were made out, a larger proportion might be recovered in equity.

2 Bos. & Pul. 269, 274.

And a surety in an indemnity bond may bring an action for contribution against his co-surety, although he has given a subsequent security to the obligees, under which he has paid the sum conditioned in the bond, without the knowledge or consent of such co-surety.

*Dunn v. Slee*, 1 Moo. 2.]

It hath been held, that if the obligee sue in Chancery the executor of one obligor to discover assets, he must make all the obligors parties, that the charge may be equal. But it is made a *quare*, whether he may not sue the principal, and leave out them which are bound only as sureties.

2 Vent. 348.

[There were three obligors in a bond, and the obligee filed his bill against the principal, and the representatives of one of the sureties, stating that A the third obligor was dead insolvent. An objection was made for want of parties, because the representatives of the third obligor were not before the court. But by Lord Hardwicke,—The general rule of the court, to be sure, is, where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account. (a) Another reason is, that the debtors are entitled to a contribution, where one pays more than his share of the debt. A further reason is, if there are different funds, as, where the debt is a specialty, and the plaintiff may sue at law either the heir or executor for satisfaction, he must make both parties, as he may come in the last place against the real assets. But there are exceptions to this, and the exception out of the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the court, unless he had paid the debt. The exception out of the second rule is, that if there are no personal assets at all, and this fact appears plainly in the cause, there is no reason to bring the representatives of that co-obligor before the court. But this is a special excepted case, and therefore not within the rule. But suppose it was a common case, and the bill had been brought by the representatives of B, one of the sureties in the bond, whether it is necessary to make the representative of A a party. As to the taking of the account, it is quite out of the case by the admission of the defendants that the bond is not paid, nor any part of the principal and

## (E) Of the Condition and Consideration of the Obligation.

interest, so that here is no ground to make the representative of A a party in order to assist him in taking the account. The other pretence is, in order for a contribution. It is admitted by all the answers, that A is dead insolvent; and therefore this differs from the case of *Ashhurst v. Eyre*, (2 Atk. 51; 3 Atk. 341,) determined before me upon a plea: for though there was an admission of insolvency in that case, yet it did not appear whether the principal and interest might not have been paid by the co-obligor, who was not before the court, and that was the reason of allowing the plea. His lordship therefore overruled the objection for want of parties.

(a) *Sed vide Collins v. Griffith*, 2 P. Wms. 313;] ||but see *Angerstein v. Clarke*, 2 Dick. 738; *Madox v. Johnson*, 3 Atk. 406.||

||Where the obligors are all principals, it is clear they must all be made parties in equity.

*Cockburn v. Thompson*, 16 Ves. 326; *Bland v. Winter*, 1 Sim. & Stu. 246.||

But it is held, that if a judgment be had at law against one obligor, you may sue the executor of him alone, to discover assets, because the bond is drowned in the judgment.

2 Vent. 348.

{If A, B, and C, separately become bound, in three different bonds, as sureties for D's duly accounting, and any one of them be compelled to pay the whole debt of the principal, he may compel the two others to contribute in proportion to the penalties of their respective bonds.

2 Bos. & Pul. 270, *Deering v. The Earl of Winchelsea*.}

||As the creditor is entitled to the benefit of all the securities the principal has given to his surety, so the surety has as full an equity to the benefit of all the securities the principal gives the creditor.

*Wright v. Morley*, *Morley v. St. Alban*, 11 Ves. 22.||

Thus, if the principal in a bond, being arrested, gives bail, and judgment is had against the bail, and the sureties are afterwards sued on the original bond, and are obliged to pay the money, the sureties shall have the judgment against the bail assigned to them, in order to reimburse them what they had paid, with interest and costs; and the sureties in the original bond are not to be contributory, for the bail stands in the place of the principal.

2 Vern. 608, *Parson v. Priddock*.

{Where the principal assigns a fund to trustees to pay a creditor whom the surety afterwards pays, and the proceeds of the fund are then paid over by the trustees, the surety is entitled to the benefit of the fund, and may recover it from the person who possesses it, in an action for money had and received in his own name.

2 Bin. 382, *Miller v. Ord*.}

## ||(E) Of the Condition and Consideration of the Obligation.

A BOND conditioned for any matter contrary to law, or given for an illegal consideration, is void; as, if it be conditioned not to exercise a certain trade anywhere in the kingdom, this is an injurious and illegal restraint of trade, and the condition is void.(a) But it is otherwise if the condition be only not to trade within certain reasonable limits.(b)

(a) *Mitchell v. Reynolds*, 1 P. Wms. 181. See Lord Macclesfield's elaborate judgment. β An illegal consideration vitiates a bond. *Page v. Trufant*, 2 Mass. 159, 162; *Bruce v. Lee*, 4 Johns. 411; *Trustees v. Galatian*, 4 Cowen, 340; *Morton v. Fletcher*,

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2 Marsh. 138; Davidson v. Givens, 2 Bibb, 200; Lewis v. Knox, 2 Bibb, 453; Davis v. Hull, 1 Litt. 9; Noel v. Fisher, 3 Call, 215; Tuxbury v. Miller, 19 Johns. 311; Goodwin v. Blake, 3 Monr. 106; Lowry v. Barney, 2 Chipm. 11; Mitchell v. Vance, 5 Monr. 529; Fanshor v. Stout, 1 South. 319; Churchill v. Perkins, 5 Mass. 541; Brown v. Getchill, 11 Mass. 16; Greenwood v. Golecock, 2 Bay, 67; Winthrop v. Doekendorff, 3 Greenl. 156; Baker v. Haley, 5 Greenl. 240; Kavanagh v. Saunders, 8 Greenl. 422; Clap v. Coffin, 7 Mass. 101. *g* (b) Ibid. Chesman v. Nainby, 2 Stra. 739; 3 Bro. P. C. 349; Clerk v. Comer, Ca. temp. Hard. 53; 7 Mod. 230, (oct. ed.) Davis v. Mason, 5 Term R. 118; Bunn v. Guy, 4 East, 190; and see Gale v. Reed, 8 East, 80.

So, where a bond was conditioned to indemnify the plaintiff against a note for 350*l.*, given by him to the prosecutor of an indictment for perjury against some of the obligors, on a corrupt agreement, that the prosecutor should not appear to give evidence; the bond was held void, and the obligee could not recover, since it was an agreement to stifle a prosecution for corrupt perjury.

Collins v. Blantern, 2 Wils. 347; and see 6 Term R. 390. *g* A bond given to suppress a prosecution of malicious mischief is void. Cameron v. McFarland, 2 Car. Law Repos. 415. In New Jersey a bond given to a person who had been injured by a battery, in order to satisfy him for the injury and to prevent his complaining to the grand jury, was held valid. Price v. Summers, 2 South, 578. *g*

So, also, a bond given for payment of a sum of money to plaintiff, to induce him to discharge a person in his custody as an impressed sailor.

Pole v. Harrobin, 9 East, 416, n. *g* A bond for ease and favour is void. Kavanagh v. Saunders, 8 Greenl. 422; Baker v. Haley, 5 Greenl. 240; 3 Greenl. 156; 5 Mass. 317; 7 Mass. 101; 5 Watts, 468. *g*

So, also, a bond given to cover the price of goods sold by the obligees to the obligor for the purpose of an illegal traffic from the East Indies, (the obligees assisting in preparing the goods for such illegal voyage.)

Paxton v. Popham, 9 East, 406.

Where the consideration on which a bond is given is illegal by any statute, the defendant may avoid the bond by pleading; or if the condition be illegal on the face of it, he may demur; and if the bond contain several conditions, although only one of them be void by statute, yet the whole bond is void.

Norton v. Syme, Moor, 856; *sed vide* Yale v. Rex, Bunb. 58; 2 Bro. P. C. 381; 2 Bl. R. 1106. Where the bond is void as to part at *common law*, still it may be good as to the residue. Newman v. Newman, 4 Maul. & S. 71; and see Dacosta v. Davis, 1 Boar & Pul. 242; *g* United States v. Brown, Gilpin, 155; 1 Gallis. 99; 4 Wash. C. C. R. 620; 2 Bailey, 501; 7 Monr. 317; 2 Greenl. 479; 7 Yerg. 17. *g* As to bonds and securities void under the gaming act, 9 Ann. c. 14, see tit. *Gaming*. *g* See also Davidson v. Givens, 2 Bibb, 200; Jones v. Jones, 2 Taylor, 110. *g* Under the statutes against sale of offices, see tit. *Offices and Officers*. *g* See also Lewis v. Knox, 2 Bibb, 453; Davis v. Hull, 1 Litt. 9. *g* Under the statutes against simony, see tit. *Simony*; under the statutes against usury, see tit. *Usury*; as to marriage-brokers bonds, see tit. *Marriage*; and as to bonds given to secure differences on illegal stock-jobbing transactions, see Cannan v. Bryce, 3 Barn. & A. 179; Amory v. Merryweather, 2 Barn. & C. 573.

A bond given on an immoral consideration is void; as, if given by a man to a woman as a premium *pudicitie*, in consideration of future cohabitation. (a) But it is otherwise if given in consideration of *past* cohabitation; and this notwithstanding the obligor be a married man during the whole period of cohabitation. (b)

(a) Walker v. Perkins, Burr. 1568; Turner v. Vaughan, 2 Wils. 339; Lady Cox's Ca., 3 P. Wms. 339; Franco v. Bolton, 3 Ves. 372. (b) Nye v. Mosely, 6 Barn. & C. 133; S. C. 2 Sim. & Stu. 269. *g* See Winnebrenner v. Wiesiger, 3 Monr. 35; Fro-



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vinger v. McBurney, 5 Cowen, 253; Forsythe v. State, 6 Ham. 21; Singleton v. Bramar, Harper, 201; Cusack v. White, 2 Rep. Const. Ct. 279. When the contract has been executed, although founded on an immoral consideration, it is binding on the parties at common law. Denton v. English, 2 N. & M. 581; Worcester v. Eaton, 11 Mass. 368. *g*

A bond given by a debtor *some time after* a general composition of 6s. 8d. in the pound with his creditors, conditioned to pay to one of them the residue of his debt, is good, though given without the knowledge of the other creditors; but if given before, or at, the time of the composition, it would be void, as being a fraud upon the other creditors.

Took v. Tuck, 4 Bing. 224; 9 Barn. & C. 437, S. C.; and see Cockshot v. Bennett, 2 Term R. 763; Butler v. Rhodes, 1 Esp. 236. *Ex parte* Sadler, 15 Ves. 52; Brady v. Shiel, 1 Camp. 146. *β* When the consideration of a bond is that the obligee shall withdraw his opposition to an insolvent debtor's discharge, the bond is void. Bruce v. Lee, 4 Johns. 411; Tuxbury v. Miller, 19 Johns. 311; Goodwin v. Blake, 3 Monr. 106; and see Waite v. Harper, 2 Johns. 386; Wiggin v. Bush, 12 Johns. 306. *g*

A bond given to persons who would be prejudiced by the passing of a private act of parliament, in consideration of their withdrawing their opposition to it, is not illegal. It cannot be considered a fraud upon the legislature.

Vauxhall Bridge Company v. Earl Spencer, Jac. R. 64, 2 Madd. 356. *||*

See further, on the subject of conditions of bonds, Vol. II. tit "CONDITIONS," (K), (L), &c.

## (F) How the Breach of the Condition must be assigned and set forth, and the Manner of Pleading Performance, and in Bar.

THE usual way of declaring and setting forth the breach on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigillatum* acknowledged, &c., and therein to lay a place where it was made, that it may receive trial, in case it be denied. Also, it is usual to say, that the bond was sealed and delivered; but this has been held not to be of necessity, and to be cured by pleading over, the calling it *scriptum suum obligatorium* implying so much. But it hath been held, not to be sufficient for the plaintiff to declare *quod reddat ei* so much, without adding *quas ei debet et injuste detinet*.

Cro. Ja. 420; Cro. Eliz. 773; 3 Lev. 348; 6 Mod. 306; Ld. Raym. 336, 763; 2 Ld. Raym. 1043.

[The bond being the sole foundation of the action, the court must see that it is properly executed; and therefore it is matter of substance, that *profert* be made of it. And the defendant being entitled to it by law, the court can in no case dispense with it.

Soresby v. Sparrow, 2 Stra. 1186; 1 Wils. 16, S. C.; *β* 1 Tyler, 311. But if the defendant plead without claiming over, the plaintiff may give a copy of the bond in evidence, on the usual proof that the original is lost, though he declared with a *profert* of the original. Taylor v. Peyton, 1 Wash. 252. *g*

But where a bond is lost, it is now holden, that the plaintiff may declare specially, "that it is lost by time and accident," and without a *profert*. And where he has made a *profert*, and the deed is lost, he may move that the production of a copy shall be over, or if he have no copy, to amend his declaration, and plead as above.

Read v. Brookman, 3 Term R. 151; Totty v. Nesbitt, *Ibid.* 153, n.; *||* Bolton v. Carlisle, 2 H. Bl. 259; *||* 1 Cr. Pr. 141; Matison v. Atkinson, 3 Term R. 153, n.; and see Whitfield v. Fausset, 1 Ves. 392. *β* United States v. Spalding, 2 Mason, 478; Every v. Merwin, 6 Cowen, 360. *g*

*||* Although the courts of law now dispense with the *profert* of a deed

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where it is alleged to have been lost by time or accident, or to be in the possession of the defendant, the courts of equity have still concurrent jurisdiction in these cases.(a) But in bills framed for relief, as well as discovery, they require an affidavit to be annexed to the bill, that the deed alleged to be lost is not in the possession or power of the plaintiff. This precaution prevents an obligee in a bond from enforcing the obligation without risk of being affected by what might appear against him were it produced.(b)

(a) *Atkinson v. Leonard*, 3 Bro. Ch. Ca. 218; *Toulmin v. Price*, 5 Ves. 238; *Ex parte Greenway*, 6 Ves. 813; *East India Company v. Boddam*, 9 Ves. 464. (b) *Fonblaque on Equity*, (5th edit.) 17, n.¶

In an action of debt for part of a debt upon contract or obligation, the plaintiff must acknowledge satisfaction of the residue; for there must be no variance from the specialty.(c) But in debt upon two bonds, the plaintiff in his declaration may acknowledge the payment of 10*l.* in part, without showing upon which bond it was paid; for it is immaterial, and can no way prejudice the defendant.(d) Besides, the money might have been paid generally, without any application to either bond.(e)

(c) *Cro. Ja.* 409; *Cro. Car.* 436; *Allen*, 57; 2 *Vern.* 129. (d) 3 *Bulst.* 244; *Roll. R.* 423. (e) However, in such case, the plaintiff has his election to which bond to apply the money. *Bloss v. Cutting*, 2 *Str.* 1194.] ¶The rules of our law as to the application of payments, where several debts are due, have been derived generally from the civil law, though the text of that law does not appear to have been consulted in the decision of our cases till *Clayton's case*, in *Devaynes v. Noble*, 1 *Meriv.* 572, determined by Sir W. Grant, M. R.; a circumstance which will, perhaps, account for our decisions, on the subject being, in some respects, at variance with the principles of the civil law, and not always reconcilable with any general rule, or with each other. The general principle is, that where there are two distinct debts, the debtor, in paying a sum, may direct to which debt it is to be applied; and the application may be made, not only by an express direction, but may be inferred from the circumstances attending the payment. *Peters v. Anderson*, 5 *Taunt.* 596; *Newmarch v. Clay*, 14 *East*, 239; *Shaw v. Picton*, 4 *Barn. & C.* 715. The mere entry, however, by the debtor, in his own books, of the account on which he pays, will not be evidence of an appropriation by him (2 *Vern.* 606); and it is the same as to such an entry made by the receiver, uncommunicated to the payer. 2 *Barn. & C.* 65. If the payer makes no express application, and no inference of his intention can be arrived at, then the right of appropriating the payment to one debt or the other devolves on the receiver. *Mayor, &c. of Alexandria v. Patten*, 4 *Cranch*, 317, 320. An officer of the United States, who holds two bonds, with different sureties, has no right to make an appropriation to one of them, so as to bind the United States. *United States v. January et al.*, 7 *Cranch*, 572, 575. When neither the debtor nor the creditor has made any application of the payments, the court will apply them to the debts for which the security is the most precarious. *Field v. Holland*, 6 *Cranch*, 8, 28. See *Sheehy v. Mandeville*, 6 *Cranch*, 253, 264. According to the civil law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor. "Permittitur ergo creditor constituere in quod velit solum; sed constituere in re presenti, hoc est, statim atque solum est; ceterum postea non permittitur." *Dig. lib.* 46, tit. iii. q. 1, 3. But our cases determine that the creditor is not bound to make such election immediately, but may make it at any time. *Wilkinson v. Sterne*, 9 *Mod.* (Leach) 427; *Peters v. Anderson*, 5 *Taunt.* 596; *Simpson v. Ingham*, 2 *Barn. & C.* 65. Many decisions of our courts seem to establish that the creditor's right of election is perfectly absolute, and that he is not bound to regard either the priority in time of the two debts, or the circumstance of one of them being more burdensome than the other to the debtor. Thus in *Wilkinson v. Sterne, ubi sup.*, Lord Hardwicke held, that a creditor by mortgage, and also by bond with penalty, might apply a general payment to the interest of the mortgage, and was not bound to place it to the discharge of the bond. So in *Peters v. Anderson, ubi sup.*, where the plaintiff had first served the defendant under a deed of covenant, and earned wages, and then had earned further wages on a common agreement, and payments were made generally by defendant, which if placed to the first debt on the covenant, would extinguish it, it was held, that the plaintiff was not bound to apply them to the first debt on the deed, but that he might sue in covenant for the balance due under

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the deed, and in *assumpsit* for that accrued subsequently. So in *Plomer v. Long*, 1 Stark. 153, Lord Ellenborough held, that a creditor was not bound to apply a general payment to a specialty debt *with surety*, in preference to a simple-contract debt without; and see *Hall v. Wood*, 14 East, 243, n. (a). In one case, indeed, where a debtor owed money on specialty carrying interest, and also on simple contract not carrying it, it was held that a general payment was to be applied to extinguish the specialty debt, that being prior *in point of time*. *Manning v. Westerne*, 2 Vern. 606. (3d edit.) The principle of the civil law was, that an inappropriate payment might be applied by the creditor at his own election, if the election was made *at the time* of payment; that if not then made, the law presumed that the payment was made on account of the debt most burdensome to the debtor; and if both debts were equal in this respect, then that it was made on account of the demand prior in point of time. "*Si autem nulla causa pręgraveret, (id est, si omnia nomina similia fuerint,) constat quoties indistincte quid solvitur, antiquiorem causam videri solutum.*" Dig. lib. 46, tit. iii. 5. Though this doctrine has never been distinctly adopted as a principle of decision in our courts, and though the above cases are certainly irreconcilable with it, yet in some other cases it appears to a certain extent to have been recognised. Thus in *Heyward v. Lomax*, 1 Vern. 23, (3d edit.) where a debtor owing money on mortgage, carrying interest, and also on simple contract, paid a sum generally, it was taken to be paid towards discharge of the mortgage, "because it was natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money for which no interest was to be paid." And in *Meggot v. Mills*, Lord Raym. 287, Holt, C. J., laid it down, with the assent of the other judges, that if A, while in trade, became indebted to B in 100*l.*, and then after leaving trade contracted a further debt of 100*l.*, and then paid 100*l.* generally, B must apply this payment to the first debt, and could not apply it to the second, and sue out a commission of bankruptcy on the first; which was also expressly decided by Lord Kenyon in *Dawe v. Holdsworth*, Peake, Ca. 64. And in a case where A deposited a note of B with his bankers as security for money owing to them, and A contracted a further debt to the bankers without any security, and then paid them money on account, Lord Kenyon held that the bankers were bound to apply the payment in discharge of the debt for which the note was security. *Hammersley v. Knowlys*, 2 Esp. Ca. 66. The two cases of *Meggot v. Mills*, and *Dawe v. Holdsworth*, have been considered to rest on the peculiar and special ground of bankruptcy, and on the presumption that the debtor must have intended to apply the payment to extinguish that debt which subjected him to the *criminality* (as it was then considered) of being a bankrupt; and the same kind of presumption appears to have been the ground of the late decision, where it was held, that where one of the debts was illegal, and the other legal, a general payment must be applied by the receiver to the *legal* debt. *Wright v. Laing*, 3 Barn. & C. 165. The case of *Hammersley v. Knowlys* may, perhaps, be deemed irreconcilable with Lord Ellenborough's decision in *Plomer v. Long*. In the cases of *Meggot v. Mills*, *Dawe v. Holdsworth*, *Hammersley v. Knowlys*, and *Wright v. Laing*, the payment, it is to be observed, was held applicable to the debt oldest in point of time; but that circumstance does not appear to have operated as a ground of decision. Those cases decidedly establish that certain limits are to be placed upon the creditor's right of applying general payments, which in many of our cases, and *dicta* of our judges, has been treated as an unqualified right, to be exercised purely according to the creditor's direction. But if the principle of these cases is admitted, it seems difficult not to extend it to the length to which it is carried by the civil law. If the circumstance of one debt exposing the debtor to bankruptcy, (as in *Meggot v. Mills*, and *Dawe v. Holdsworth*), is to be considered a ground for presuming an intention to discharge that in preference to another debt unattended with such serious consequences, it seems difficult to deny that the same presumption arises, to a certain extent, from the fact of one debt being in *any* degree more onerous to the debtor than the other (as in case of its carrying interest, or being with a penalty, or being a specialty, or with a surety); and the rule of the civil law, that the general payment shall be taken to be paid "*in graviorem causam*," surely appears both more equitable and more certain than admitting the general right of the creditor to make the application, and, at the same time subjecting it to the sort of undefined qualification put upon it by the four cases above referred to. See Sir W. Grant's luminous judgment, 1 Meriv. 604, and *Perris v. Roberts*, 1 Vern. 34. It is now clear that the creditor's right to apply an indefinite payment arises only in the case of distinct and *insulated* debts, not in the case of *several items* composing one *general account*; in the latter case it is settled, "there is no room for any other appropriation than that which arises from the order in which the receipts

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and payments take place, and are carried into the account." The debt which arises first in these cases, is that to which the payment is first applicable. Clayton's Ca., 1 Meriv. 608; Bodenham v. Purchas, 2 Barn. & A. 39; Hammersley v. Knowlys, 2 Esp. Ca. 667; Bosanquet v. Wray, 6 Taunt. 597; and this is conformable to the rule of the civil law.]

In debt on a bond with condition, the plaintiff may declare generally, and it is on the defendant's part to show the condition, which goes by way of defeasance; and if he demandoyer, and demur, the plaintiff shall have judgment.(a)

Lev. 88; Salk. 326. {In debt on bond for the performance of covenants the plaintiff may either declare for the penalty, and assign breaches at the same time in his declaration, or he may declare simply for the penalty, and leave the assignment of breaches till the replication, where he must assign them, if the nature of the plea demand it. 2 Cain. 328, Munro v. Alaire, and the cases there cited; 2 Johns. Rep. 413, Postmaster-General v. Cochran; 1 Saund. 58, note 1, by Serjeant Williams.} [(a) Not if the condition be illegal upon the face of it, for in that case the demurrer is proper. 2 Bl. R. 1108; 11 Co. 26.]

Error upon a judgment in debt, upon an obligation of 600*l.*; the error assigned was, that there was not a sufficient breach alleged; for the condition being that he should enjoy such lands without eviction, the breach was assigned in the recovery by verdict in ejectment, upon a lease made by one E, and does not show what title E had to make the lease, but avers that E had a good title; and it might have been, that he had title from the plaintiff himself after the obligation made; and therefore he ought to have showed a good and eigne title before the lease made. *Et per cur.*—The replication is ill; for it ought to (b) comprehend a full and manifest breach, otherwise it is not good.

Cro. Ja. 315, Kirby v. Hansaker; Mod. 294, S. C. cited, and allowed to be law; and so in 3 Mod. 135; Vent. 84; 2 Lev. 37, but 3 Lev. 325; Mod. 66, seems *contra*; and there said by Jones, that, since this case, the statute 21 Jac. 1, c. 13, and 16 & 17 Car. 2, c. 8, have greatly strengthened verdicts. (b) That in debt upon a bond to perform covenants, the replication must show a certain breach; but in covenant, it is sufficient to assign a general breach. Salk. 139, pl. 5; Ld. Raym. 478.  $\beta$  A declaration on a penal bond, from one private person to another, must aver the non-payment of the penalty. State v. McClane, 2 Blackf. 193. In an action for the penalty of a bond, it is not requisite that the plaintiff should declare he has sustained damages in consequence of the defendant's refusal to pay, nor to allege when such breaches are assigned, that the plaintiff has been injured by them. Allison v. Farmer's Bank, 6 Rand. 204. See the following cases, Mitchell v. Merrill, 2 Blackf. 87; Chiles v. Calk, 3 Monr. 341; McDowell v. Burwell, 4 Rand. 317; Tinney v. Ashley, 15 Pick. 546; Whitney v. Spencer, 4 Cowen, 39.

||But the plaintiff is under no necessity of setting out the title of the person who entered upon him, because he is a stranger to it, it being considered sufficient to allege generally, that he *had a lawful* title before, or at the time of the conveyance to the plaintiff.

2 Saund. 181, n. 10, (5th ed.); 1 Show. 70. See *ante*, tit. *Covenant*, (I); 4 Term R. 617; 8 Term R. 278; *Post*, tit. *Pleas and Pleading*, (B) 3.

Where the eviction is by a stranger, it must be shown to be a lawful eviction, and not a mere wrongful act; but where a covenant, or condition of a bond, is special against the acts of a particular person, it extends to all his acts, whether rightful or wrongful: and therefore it is sufficient in such a case, to allege generally that the party entered. However, some particular act must be shown by which the plaintiff is interrupted, for otherwise the breach of a covenant or condition for quiet enjoyment is not well assigned.

1 Term R. 671; Nash v. Palmer, 5 Maul. & S. 374; Fowle v. Welsh, 1 Barn. &

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C. 29; 2 Saund. R. 181, n. 10; Com. R. 228. ¶ In an action on a bond given to refund, if the land should be lost by intervening claims, an averment that the land was lost by an intervening claim, without showing by what title, or in what suit, is sufficient after verdict. *Hawkins v. Walker*, 4 Bibb, 292. *g*

If the condition of an obligation be to deliver, before the 5th of Jan., twenty quarters of corn out of a ship into a barge, to be brought by the plaintiff to receive the said corn; and the plaintiff assign for breach, that the defendant did not deliver it 5th Jan.; it is good: for when one is obliged to deliver, and the other to accept, it shall be presumed that the plaintiff was there before the time, ready to accept the corn with his barge.

Salk. 140, pl. 6; Ld. Raym. 620.

If the breach be assigned after the action brought, it is ill; as, where in debt on an obligation for non-performance of covenants, the plaintiff replied, and assigned a breach in non-payment of rent the 20th of June, 17 Car. 2, and the bill was filed Trin. 17 Car. 2, which term ended the 14th of June; this was held ill.

Sid. 307, *Champion v. Shipweth*; but the reporter says, that if the obligation be for payment of money, and the money become payable pending the action, this makes the action good; *secus*, where the condition is for performance of covenants; vide *Cro. Eliz.* 325; 4 Leon. 98; *Keb.* 106.

It is said, that in an obligation for performance of covenants, the breach ought to be more precise and particular than in actions of covenant; but that yet if what is material, and the substance, is alleged, it is sufficient; as, where the condition of an obligation was, that the defendant, a bailiff, should not let at large any prisoner arrested without license of the plaintiff, an under-jailer; and the breach assigned was, that the defendant had let at large such a one, whom he had arrested at Westminster, without license, &c.; this was held sufficient, though the particular time and place were not set forth, the escape being the material part of the covenant or condition.

Sid. 30; *Jenkins v. Hancock*, *Cro. Eliz.* 749. ¶ A direct negative, in the words of the condition, is a sufficient assignment of a breach in the declaration. *United States v. Spalding*, 2 Mason, 478; 2 H. & M. 446, 459. See *Dickinson v. M'Craw*, 4 Rand. 158; *Glidewell v. M'Gaughey*, 2 Blackf. 259. *g*

If the replication be repugnant to the declaration, it makes the declaration ill, because the subsequent pleading falsifies the declaration; as, if a man declares on a bond made 1 Martii, if the plaintiff replies, that the bond was delivered 30 Martii, this falsifies the declaration; because it could not be made the first: so if the rejoinder falsifies the bar, the bar is vitious.

*Cro. Ja.* 264; *Saund.* 116, 226. ¶ The assignment of one breach in the declaration, and a different one in the replication, is bad on general demurrer. *Henries v. Stiers*, 3 Halst. 364. *g*

A debt on a bond, with condition for performance of several things; the defendant pleads *quod conditio ejusdem facti nunquam infracta fuit per se ipsum*, &c., and held an ill plea; because for saving the bond it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted.

2 Vent. 156. ¶ On an action of debt on bond for the payment of money, the plea of "conditions performed" is tantamount to a plea of payment. *Hammit v. Bullett*, 1 Call, 567. *g*

So, if he had pleaded *performavit omnia*, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly.

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But, if the condition were for performance of covenants in an indenture, performance generally will be a good plea, if they are all in the affirmative.

1 Lev. 303; 1 Sid. 213. {If, in debt on bond conditioned for performing covenants, the breaches are specially set forth in the declaration, the defendant cannot plead performance generally, but must show when, how, and where he performed his covenant in those particulars. 2 Johns. Rep. 413, *Postmaster-General v. Cochran.*} β See *Freeland v. Ruggles*, 7 Mass. 511; *Tinney v. Ashley*, 15 Pick. 546; *Postmaster v. Cochran*, 2 Johns. 413; *Bailey v. Rogers*, 1 Greenleaf, 190; *United States v. Arthur*, 5 Cranch, 257.γ Defendant cannot plead conditions performed, to a bond for performance of covenants, without oyer of the deed, which contains the covenants. R. 1 Sid. 50, 97, 425; 1 Vent. 37; R. Al. 72; {4 East, 340, *Earl of Kerry v. Baxter*, S. P.} And he must make a *profert in cur.* of the deed, otherwise it will be bad on a special demurrer. R. 1 Saund. 9. β When a multiplicity of matters are comprehended in the condition of a bond in general terms, all in the affirmative, the plea of performance is allowed to prevent prolixity. *Bailey v. Rogers*, 1 Greenleaf, 190; *Dawes v. Gooch*, 8 Mass. 488; but see *Reynolds v. Torrance*, 1 Const. Rep. 125.γ

||To debt on bond conditioned for performance of articles in an agreement referred to, a plea of performance generally was held bad on special demurrer, because it did not appear but that some of the articles might be negative or disjunctive.

*Earl of Kerry v. Baxter*, 4 East, Rep. 340; and vide 1 Saund. 117, n. (1,) (5th ed.)

And it seems doubtful whether the plea would have been helped by an allegation that none of the articles were *negative* or *disjunctive*.

So, where general performance was pleaded to debt on bond conditioned to perform covenants, and the plaintiff in his replication set out the indenture *verbatim*, and then demurred, showing for cause that the defendant had not shown how he had performed the negative covenants; the demurrer was held good. But, if the indenture set out in the replication had contained no negative or disjunctive covenants, the defect of the plea in not setting out the indenture would have been cured.

*Plomer v. Rain*, 4 East, Rep. 344, n.||

Debt on a bond conditioned to deliver goods on such a day; the defendant pleads, that he delivered them according to the form of the condition; the plaintiff demurred, because he ought to have pleaded expressly, according to the words of the condition, that he delivered them on the day; and the court inclined to that opinion.—(a) So, in debt on a bond conditioned to pay a sum of money at D such a day, the defendant pleads payment at the day *secundum effectum conditionis*; the plaintiff demurred specially, because he does not say where he paid it: and it was held to be form at least; and the plaintiff having demurred specially had judgment. (b) And generally, where performance is pleaded, it ought to be pleaded in the words of the condition.

Lev. 145, Nels. Lutw. 368. (a) 3 Lev. 245. (b) 2 Salk. 520, pl. 22; 2 Ld. Raym. 1138; Salk. 208, pl. 8; 6 Mod. 157, 197.

[But, where the condition of a bond was, “that the defendant should from time to time *render a just and true account* of all moneys received by him as treasurer of the parish of B,” &c., and the breach assigned was, that on the last account furnished by the defendant, there appeared to be due by him a large sum of money, which he had not *paid over*; the defendant demurred because the breach was not within the condition, which was only to *account*: but *per curiam*, the intention of the parties, and fair construction of the condition is, that the money should be paid; for to construe it a con-

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dition to enforce the making out a paper of items and figures is idle and nugatory.

*Bache v. Proctor*, Doug. 382. *See* *Glidewell v. M'Gaughey*, 2 Blackf. 359; *Chiles v. Calk*, 3 Monr. 341; *M'Mahan v. Murphey*, 1 Bailey, 535.*g*

Where the defendant, being appointed agent to the plaintiffs, gave a bond, conditioned for the payment of all sums of money by him received to the use of the Company; and the breach assigned was, "that the defendant had received from J S and several other persons divers sums of money, which he had not paid to the Company;" it was holden, that the assigning of the breach in the receipt of *divers sums* from *several persons*, was too general and uncertain, and therefore bad.

*African Company v. Mason*, Gilb. Rep. 238, cited 2 Burr. 773, and 1 Str. 227. *See* *Jones v. Cooper*, 2 Aik. 54; *Austin v. Burbank*, 2 Day, 474; *Julliard v. Burgott*, 11 Johns. 6; *Gale v. O'Brien*, 13 Johns. 189; *Union Bank v. Ridgeley*, 1 Harr. & Gill, 324.*g*

But where, in debt on a bond as security for a person appointed agent to a regiment, the breach assigned was, "that the defendant had received several sums of money from the paymaster-general, for the use of the regiment, which he had not paid over to the officers according to their respective proportions:" this breach was, on demurrer, holden to be well assigned; for the money was received from one person, (not from many, as in the last case,) and for one purpose, to pay the regiment; and the defendant's omitting to pay any part of it was a breach of the bond.

*Cornwallis v. Savery*, 2 Burr. 772.]

||So in debt on bond conditioned for J S rendering an account to the plaintiffs of all moneys which he should receive as their agent; the defendant pleaded performance in the words of the condition; plaintiffs replied that J S received divers sums, amounting to 2000*l.*, belonging and relating to the plaintiffs' business, as their agent, and had not rendered an account of the said 2000*l.*, or any part thereof: this replication, being specially demurred to for generality, was held sufficient.

*Shum v. Farrington*, 1 Bos. & Pul. 640.

Where, also, to debt on bond conditioned that one B R should account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity. The defendants pleaded performance generally. The plaintiffs replied, that B R had received *divers sums*, amounting to a large sum, viz.: 100*l.*, from *divers persons*, for *divers voluntary contributions*, for the use of the said charity, which he had not accounted for, or paid over, &c. On special demurrer the replication was held sufficient.

*Barton v. Webb*, 8 T. R. 459.

So, in debt on bond conditioned to perform an award, and performance pleaded, it was held sufficient to assign a breach generally in the words of the award.

*Wilcocks v. Nicholls*, 1 Price, 109; and vide Com. Dig. tit. *Pleader*, c. 45. || *See* *Tomkins v. Corwin*, 9 Cowen, 255.*g*

[In debt on a bond given as a security for the faithful service of a clerk, the breach assigned was, "that a large sum of money, viz.: 13*l.*, came to the clerk's hands on account of the plaintiff, which he (the clerk) had

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spent and embezzled." This breach is ill assigned, inasmuch as it does not show how and from whom the money so embezzled had been received.

*Jones v. Williams*, Doug. 214. [But this case was overruled in the two foregoing cases in 1 Bos. & Pul. 640, and 8 Term R. 459.] β When the condition of the bond is intended as a security for a limited period, the time of the breach is material, it must be shown to have taken place within that period. *Union Bank v. Ridgeley*, 1 Har. & Gill, 324.g

The condition of a bond was, "that the plaintiff should furnish the defendant with ale and beer, to be used in his house, at such prices, and that he should take it of nobody else; but might take his other liquors from whom he pleased, malt liquors only excepted." The breach assigned was, "that such a quantity of *liquors* was drawn and unpaid for." On demurrer, it was holden, that the breach was improperly assigned, for it did not appear that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff.

*Sibbs v. Clough*, 1 Str. 227. β The condition of a bond was to "free the land from all encumbrances, either by deed or mortgage, now in existence and binding on the premises by the 20th of February;" the breach assigned was by following the words of the condition and negating them; it was held that such assignment does not necessarily amount to a breach, and the plaintiff ought to have shown some existing encumbrance on the 20th of February, or at the commencement of the suit. *Julliard v. Burgott*, 11 Johns. 6.g

The defendant's wife, when sole, gave a bond to the plaintiff in the penal sum of 1200*l.* if she married *any other person* than the plaintiff, or refused to marry him within one month after her father's death. She married the defendant in her father's lifetime, upon which the plaintiff brought debt on the bond, and assigned her marriage as a breach: and it was holden to be good, (though it was insisted, that she might still perform one part of the condition by marrying the plaintiff after her father's death, as he might survive her husband;) for that by the breach of one of the conditions the bond became absolute.

*Box v. Day*, 1 Wils. 59.

A bond was for the payment of a sum of money by instalments; the condition was for the payment of these instalments, without the words *or any of them*. It was nevertheless resolved, that the obligee might, on default of payment of any of the instalments, bring his action on the bond.

*Hallett v. Hodges*, Say. Rep. 29.] {On a bond with a penalty, conditioned for the payment of money by instalments, an action may be brought on failure to pay the first instalment; and judgment will be given for the penalty, to remain as a security for future payments. 1 Wils. 80, *Coates v. Hewit*; Buller, 168; 2 W. Black. 706, *Masfen v. Touchet*; 1 Cain. 440, 443, *Ten Eyck v. Tibbits*; Ibid. 517, *Brown v. Hallet*; 1 Mass. T. Rep. 10, *Waldo v. Fobes*; 1 Bin. 152, *Sparks v. Garrigues*. Such a bond is within the statute 8 and 9 W. 3, c. 11, s. 8, and after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, even within a year after such judgment, without first suing out a *scire facias*. 6 East, 550, *Willoughby v. Swinton*. And see 8 Term, 126, *Walcot v. Goulding*; 2 Burr. 820, *Collins v. Collins*; [Judd v. Evans, 6 Term R. 399; and see *Talbot v. Hudson*, 2 Marsh. 527; *Eastwood v. Hole*, 3 Price, 219.]]

In debt on an obligation for payment of money, &c., the defendant pleads, that at the time and place *paratus fuit* to pay the money, but that nobody was there to receive it; and held ill, on a general demurrer, for want of an *obtulit solvere*; for the tender only is traversable, not the *paratus*.

3 Lev. 104. β The plea to an action of debt on bond for the performance of certain work within a specified time, that the defendant was ready to do the work, and that the plaintiff refused to permit it to be done, should also show that the refusal was prior to the expiration of the time specified for doing the work. *Cox v. Way*, 3 Blackf. 143. See *Savary v. Goe*, 3 Wash. C. C. R. 140.g



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In debt on an obligation by a master of a ship against a merchant, for the performing of agreements in a charter party; the declaration was, *et ad performationem conventionam ex parte dicti mercatoris obligasset se dicto magistro, &c.* Adjudged insufficient, for want of the word *ipse*, or *ipse predict. mercator obligasset, &c.*

Vent. 196; Cro. Eliz. 913; Salk. 26, pl. 13; and vide tit. *Amendment and Joinders*.

In debt on a bond with condition, the defendant pleaded a collateral plea, which was insufficient; the plaintiff demurred, and had judgment without assigning a breach; for the defendant by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not. But, if the plaintiff had admitted the plea, and made a replication which showed no cause of action, it had been otherwise. But, if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment without assigning a breach.

Lev. 55, 84; 3 Lev. 17, 24; Tryon v. Carter, 2 Burr. 944, S. P. To an action of debt on bond, the defendants pleaded that the bond had been obtained from them by misrepresentations and false suggestions by the plaintiff, "as per the preamble in the said bond; plaintiff replied no fraud, and issue was joined. Held that the plaintiff having joined issue on this plea, instead of demurring, waived the right of urging an estoppel, if such a right existed. Chew v. Moffet, 6 Munf. 120.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendant pleads a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance admits it, and the plaintiff need not show that which the defendant hath supposed and admitted.

Salk. 138, pl. 2, vide tit. *Arbitrament*. {Willes, 9, Shelley v. Wright, S. P.}

But, if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must show a breach; for then he has no cause of action, unless he show it; and this difference will give the true reason, and reconcile the cases in the (a) margin.

Salk. 138, pl. 2; Tryon v. Carter, 2 Burr. 944. (a) Lev. 55, 84, 226; Saund. 102, 159, 317; 3 Lev. 17, 24; Vent. 114; Cro. Eliz. 320; Yelv. 78.

In debt on an obligation to pay for what goods an apprentice shall waste; the plaintiff in pleading need not show what the goods were, for he is to recover the penalty of the bond: otherwise in covenant.

Lev. 194. [Qu. the passage in Levinz? The reference is faulty.]

Pleading the breach of a condition of a bond, *eo quod* it was not paid, &c. is a good affirmation; as in avowry, *et quia* the rent was arrear, is good; so, in all *assumpsits* on collateral promises to pay on request, *licet* such a day and place he requested, is an affirmation, and traversable.

Saund. 116; 2 Vent. 278; Lev. 194.

Pleading a bond by a *testatum existit* is not good, though it be with a *hic in curiâ prolat.*

2 Lev. 12, 75; Saund. 275.

Debt on an obligation conditioned to perform articles; the defendant demands oyer, and then pleads the articles and performance; the plaintiff prays they may be entered *in hæc verba*, and then demurs; because the defendant in pleading the articles omitted part; and the plaintiff had judgment; for perhaps he might have assigned the breach in those omitted, of which advantage he is by this means deprived.

Hudson v. Spier, 3 Lev. 50.

(F) Assigning Breaches, and Pleading. (8 &amp; 9 W. 3, c. 11.)

[Debt on bond for performance of covenants in certain indentures: the defendant demands oyer; and then pleads, that there are not any covenants in the indenture to his part to be performed: the plaintiff pleads oyer of the indenture by the defendant brought into court, which is entered at large in *lat. verba*; and it appears, that there are several covenants in the indenture on the defendant's part, upon which the plaintiff demurs. It was insisted by the defendant's counsel, that the plaintiff had demurred too hastily, for he ought to have shown a breach of one of his covenants to maintain his action: as, in debt on a bond to perform an award, if the defendant pleads no award made, it is not sufficient for the plaintiff to reply and show an award made, but he must likewise show a breach thereof: so, here, when the defendant pleads there are no covenants in the indenture, the plaintiff must not only show the covenants, but likewise to assign a breach in them. So was the court; and judgment was given for the plaintiff without any difficulty. And the reason seems to be, that when the defendant brings the indenture into court, and saith, that there are no covenants therein, in law there is the indenture is made part of the (a) plea; and it thence judicially appears to the court, that he hath pleaded a false plea, and hath made an affirmation against the truth of that which appears to the court by the very indenture which he himself hath brought into court; and so the plaintiff need not show any matter of fact in a replication to maintain his action, as in the case of an award, but a demurrer was more proper.

(a) *See* *Jeffery v. White*, Dougl. 476. *see* [

In an action on a bond conditioned for the payment of a separate maintenance to the plaintiff's wife, the defendant alleged that certain sums became due and owing from the defendant to the obligee. Judgment was arrested, because the bond was not made inured to the money to be due to the wife.

(b) *See* *Jeffery v. White*, Dougl. 476. *see* [

The action on bond, the condition of which was, that A B should deliver a true account of all moneys received by him in pursuance of his office, the defendant pleaded performance generally. The plaintiff, in his replication, alleged that he had paid A B was requested to deliver a true account of all moneys received by him in pursuance of his office, but refused so to do; and in several particulars, that his assignment of the breach was bad, in as much as that A B was not a true account of his moneys by virtue of his office."

(c) *See* *Jeffery v. White*, Dougl. 476. *see* [

Where the condition of a bond is, that the plaintiff could only assign one breach upon a bond to perform a sum for the performance of covenants; if he assigns several breaches, the condition was bad for duplicity, because the bond was made to be broken in covenant as much as by several. (c) But the law has been extended to extend not only to the non-performance of covenants and agreements secured by bonds, whether the agreement be in the bond or separate, but also to bonds, &c., for the payment of money by instalments, or for the payment of an annuity, but not for bonds to be paid at a certain day, or within a month after party's death, (g) for the performance of an award, (h) or for the performance of any other special condition, the payment of a sum in gross, and except the cases of a bond to be paid at a certain day, and the bond of a petitioning creditor, (l) the plaintiff, if he is a creditor of record upon such bond or penal sum, may assign as many breaches as he pleases, and the jury are to assess not only such damages and costs as

## (F) Assigning Breaches, and Pleading. (8 &amp; 9 W. 3, c. 11.)

were usually given before the statute, but also damages for such breaches as on the trial the plaintiff proves to have been committed. And on judgment for the plaintiff on demurrer, by confession, or *nil dicit*, he may (n) suggest the breaches he complains of upon the roll, and prove the truth thereof, and assess his damages upon a writ of inquiry. And upon this branch of the statute it has been decided, that where the plaintiff only states the bond in his declaration, and the defendant pleads *non est factum* (o) or *non est factum*, and that the bond was obtained by fraud and covin, (p) and issue is joined thereon, he may still enter an assignment of breaches on the record in making up the issue. The like judgment is entered on verdict for the plaintiff as before the statute was usually done; and upon payment by the defendant, before execution, of his damages assessed, together with his costs and charges, a stay of execution is to be entered upon the record; or if upon execution the plaintiff has been paid all the damages, costs, and the charges of the execution, the defendant's body, lands, or goods are to be forthwith discharged therefrom, which is likewise to be entered of record; but in either case *the judgment is to remain as a further security*, to answer any further damages the plaintiff may sustain by any further breach of covenant contained in the same instrument;—and for such breaches the plaintiff may have a *scire facias* against the defendant, his heirs, tenants, or executors or administrators, summoning him or them respectively to show cause why execution should not be awarded upon the judgment, upon which there is the same proceeding as took place in the action of debt upon the bond for assessing the damages upon trial or writ of inquiry.

(b) Vide tit. *Covenant* (I), vol. 2. (c) 1 Saund. 58, note, (5th edit.) (d) *Hunt v. Jennings*, 5 Barn. & C. 650. (e) *Willoughby v. Swinton*, 6 East, 550; and see 2 W. Bl. 706, 958. (g) *Walcott v. Goulding*, 8 Term R. 126; *Cardoza v. Hardy*, 2 Moo. 220; *Murray v. Earl of Stair*, 2 Barn. & C. 82. (h) *Welch v. Ireland*, 6 East, 613; and see 1 Price, 109. (i) *Moody v. Pheasant*, 2 Bos. & Pul. 446. (k) 2 Saund. 187. (l) *Smith v. Broomhead*, 7 Term R. 300; *Smithey v. Edmonson*, 3 East, 22. (m) 5 Term R. 637, 538. (n) *Ibid.* (o) *Ethersey v. Jackson*, 8 Term R. 255. (p) *Homfray v. Rigby*, 5 Maul. & S. 60. See 14 East, 401; 5 Taunt. 386. See 1 Saund. 58 a, (5th edit.); 2 W. Bl. 1190; 6 Term R. 303.

In debt on bond conditioned not to assault, molest, or injure the person of the plaintiff, the replication, alleging that defendant assaulted, &c., by beating and ill-treating plaintiff, was held a sufficient assignment of the breach of the condition, for which the jury were to assess damages on stat. 8 & 9 W. 3, c. 11, § 8, though such breach were not alleged in formal terms according to the statute.

*Tombs v. Painter*, 13 East, R. 1; *sed vide De la Rue v. Stewart*, 2 New R. 362; and see 5 Moo. 198.]

In debt on a bond, with condition to exhibit an inventory to the ecclesiastical court before such a day, it is not enough for the defendant to plead, that there was no court held, but he must plead also that he was there ready; for he must show that he has done all that could be on his side toward a performance. So, if the condition were to levy a fine *in Oct. Hil.*, by which the obligee is to sue out the writ of covenant; it is not enough for the defendant to plead, that no writ of covenant was sued out, but he must plead, that he was there ready at the day, and no writ of covenant was sued out. So, if the condition were to pay money to J S at a certain time and place, it is not enough for the defendant to say, that the obligee came not, without saying that he was there ready and offered, &c.

Salk. 172, pl. 4.

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¶But where an indenture contained covenants to sink coal-mines by a certain day, as far as could be accomplished, or, in default to pay so much to the lessor as should be awarded. On default a sum was awarded to the lessor for the time past, and an annual rent for the time to come, until such coal-mines should be sunk. To an action on a bond conditioned to perform the award, it was held sufficient plea that the defendant paid the sum awarded, and that he had sunk for coal-mines, but that, on trial, there were none found fit to be worked.

Hanson v. Boothman, 13 East, R. 22.]

[To debt on bond conditioned for the payment of a certain sum on a certain day, the defendant pleaded, that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly, it was holden bad. Baldee v. Eler, 5 Term R. 250.]

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff; so, he may plead payment as to part, and as to the rest an acquittance.

Salk. 180. [Bonds are within the act 4 & 5 Ann. c. 16, which allows the defendant to plead double: therefore, where the condition was to marry on request, *non est factum*, and *never requested*, were allowed to be pleaded together. Dunn v. Vacher, 2 Stra. 908. So, *non est factum*, and a *discharge by bankruptcy*. Atkinson v. Atkinson, Ibid. 871. But not *non est factum*, and *solvit aut diem*, Arnold v. Baas, 2 Bl. Rep. 993; or *solvit post diem*, Fox v. Chandler, Ibid. 905; or *non est factum*, and a tender as to part, Jenkins v. Edwards, 5 Term Rep. 97.] ¶Sed vide 13 East, 255.]

In debt on an obligation, if not guilty be pleaded, and there be a verdict for the plaintiff, it is aided by the 16 and 17 Car. 2, c. 8, because being an ill plea, and a false one, the plaintiff ought to have his judgment, both because of the badness of the plea, and for its falsehood. But, had the verdict been for the defendant, yet the plaintiff should have judgment, because the declaration is not answered by the plea.

Noy, 56; Cro. Eliz. 773; 2 Johns. 184.

In debt on a bond conditioned for the payment of 105*l.* the defendant pleads payment of 100*l.*, *secundum formam effectum conditionis*; the plaintiff replies, *non solvit predict.* 105*l.*: this is an immaterial issue, not aided by the statute; for the plaintiff has not traversed the same payment that is in the defendant's plea.

Cro. Ja. 583; Cro. Car. 593. ¶See Cobb v. Bryan, 3 Bos. & Pul. 348; Corporation of Arundel v. Bowman, 2 Moo. R. 91.]

In debt on an obligation, the defendant pleads payment of 50*l.* 14 Junii, 11 Jac. according to the condition; the plaintiff replies, *quod non solvit 50*l.* predict.* 14 Aug. anno 11 supradict., *quas ad eundem diem solvisse debuisse, et hoc, &c.*; the verdict found, *quod non solvit predict.* 14 Junii, *prout* the defendant had alleged. The objection here was, that no issue was joined; because they do not meet in the time the money was paid. But the word *August* was adjudged to be plainly surplusage; for when he said *quod non solvit predict.* 14 die, it is a sufficient traverse, without the word *August*; and *August* is plainly repugnant to the word *predict.*, for *predict.* refers to *June*, and such surplusage, being a repugnancy to what was before material, was idle and void.

Cro. Ja. 110; Sand. 989, 990.

¶If one declared on a bond made 1 Martii, if the plaintiff reply, that the

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bond was delivered 30 *Martii*, this falsifies the declaration, because it could not be made the first, and is therefore vitious.

Cro. Ja. 264; Sand. 116, 226.

In debt on an (*a*) obligation the defendant cannot plead *nihil debet*, but must deny the deed by pleading *non est factum*; for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*.

Hard. 332; Hob. 218. [(*a*) So held on a general demurrer. Anonymous, 2 Wils. 10.]  $\beta$  Bullis v. Giddens, 8 Johns. 82; Bauer v. Roth, 4 Rawle, 83; Sneed v. Wistar, 8 Wheat. 690; Jansen v. Ostrander, 1 Cowen, 670; Baynton v. Reynolds, 3 Mia. 79. *g* But, if the debt be due by simple contract, then he may plead *nil debet*; for it does not appear that there is any debt continuing. 2 Inst. 651; Hob. 218.  $\beta$  *Nil debet* may be pleaded when the speciality is mere inducement to the action. Minton v. Woodworth, 11 Johns. 474. *g*

[On the plea of *non est factum*, only questions of fact can arise. Where, therefore, the condition is void in law, the defendant should pray oyer, and demur, if the illegal condition appears upon the face of it; if not, plead the special matter to avoid it.

Colton v. Goodridge, 2 Bl. Rep. 1108; Pigot's case, 11 Co. 26; Thomson v. Leach, 2 Salk. 675.

Hence, if a bond be given for a gaming debt, the statute should be pleaded. And in such plea, the defendant should set out the game played at, and conclude *contra form. stat.*, that the court may see that it was within the statute. So, in pleading simony or usury, the simoniacal or usurious contract must be shown.

Colborne v. Stockdale, 1 Stra. 493; Hinton v. Roffey, 3 Mod. 35; §6 Term R. 460. Where the consideration of the bond is illegal by the common law, or by statute, the bond must be avoided by a special plea; Colton v. Goodridge, 2 Bl. R. 1108. Harmer v. Wright, 2 Stark. Ca. 35; Harmer v. Rowe, 2 Chit. R. 334; Ferrall v. Shaen, 1 Saund. R. 295 a; *sed vide contra*, Thompson v. Rock, 4 Maul. & S. 338: but where the bond is void by reason of something affecting its execution, which renders it not the deed of the party, this may be given in evidence on *non est factum*, as that it was delivered as an escrow, or obtained by fraud,  $\beta$  but fraudulent representations by the obligee as to the consideration for which a bond was given, are not a defence at law, to a suit on the bond, Dorr v. Mansell, 13 Johns. 430; Stevens v. Judson, 4 Wend. 471; Dale v. Roosevelt, 9 Cowen, 309; Guy v. McClean, 1 Dev. 46; Taylor v. King, 6 Munf. 358; Wyche v. Macklin, 2 Rand. 426; Huston v. Williams, 3 Blackf. 170. But this is not the rule in Pennsylvania, Swift v. Hawkins, 1 Dall. 17; Solomon v. Kimmel, 5 Binn. 232; nor in South Carolina, Gray v. Handkinson, 1 Bay, 278; Waring v. Cheeseborough, 1 Hill, 187; and it has been changed in New York by statute, Case v. Broughton, 11 Wend. 106; and in Indiana, by statutory enactment, fraud, covin, and fraudulent considerations, as to the consideration, are made a legal defence on bonds and writings obligatory, except conveyances of real estate, and instruments negotiable by the law-merchant, 3 Blackf. 171: *g* or made by a *feme covert*, Com. Dig. *Pleader*, 2 W. 18; or made by a lunatic, Stra. 1104; or by a drunken man, B. N. P. 172;  $\beta$  Guy v. McClean, 1 Dev. 47; Williams v. Inabnet, 1 Bailey, 343; *g* or avoided by erasure, 3 Camp. 181.  $\beta$  When the principal in a bail bond, after it was signed by the surety and in his absence, but before delivery, erased the name of the sheriff as obligee, and inserted that of the constable who served the precept, at the suggestion and in the presence of the constable; this alteration, it was held, under the circumstances of the case and the peculiar law of Maine, did not avoid the bond. Hale v. Russ, 1 Greenl. 334; *g* and see the learned note, 5 Coke's R. 119 b, (ed. 1826.)

¶ And this may be done, although the matter alleged in the special plea be inconsistent with the condition of the instrument. Thus, to debt on bond conditioned for the payment of a sum of money which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at *respondentia* interest, secured by a cargo of goods shipped from Calcutta to Ostend; it was held, that the defendant might plead that the

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bond was given to secure the price of goods sold by the obligees to the obligors in the East Indies, and illegally prepared by the obligees for shipment from thence to beyond the Cape of Good Hope, without the license of the East India Company, without proceeding to state formally that the condition was colourable, to conceal the illegality of the transaction, and without negating that the bond was given for money *taken up, borrowed, and received, &c.* For the statement in the plea was rather explanatory of, than absolutely inconsistent with, the transaction stated in the bond; but, if it were inconsistent with it, the plea would still be good.

9 East, 422; 9 Barn. & C. 463; Paxton v. Popham, 9 East, R. 408; and see Lady Downing v. Chapman, 9 East, R. 414, n.; and vide Collins v. Blantern, 3 Wils. 41, and tit. *Condition* (K).

An officer cannot commute for money the services of an impressed man, nor let him go for money: therefore a bond given to secure the man's return on non-payment of such money, may be avoided by plea disclosing the true transaction, and showing that the man was illegally impressed.

Pole v. Harrobin, 9 East, R. 417, n.  $\beta$  But a bond to indemnify against an unlawful act or omission already past, is valid. Given v. Driggs, 1 Caines, 450.*g*

And where to debt on bond the defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in London by the plaintiff to the defendant, to be by the latter shipped to Ostend, and from thence re-shipped for the East Indies, and there trafficked with clandestinely; this was held a sufficient bar to the action—the case being within the stat. 7 Geo. 1, c. 21, which avoids all contracts for supplying cargoes to foreign ships in such a trade.

Lightfoot v. Tenant, 1 Bos. & Pul. 551.

So, where a bond, after reciting that A B was colonial secretary of Tobago, and had appointed C D to be his deputy, in consideration of his paying thereout to A B the annual sum of 450*l.*, was conditioned for punctual payment of that sum, (without saying “out of the fees,”) and defendant pleaded that the bond was given in pursuance of an agreement to pay that sum *at all events*, on which issue was joined and found for the defendant; it was held, that, even supposing the agreement to be inconsistent with the language of the bond, it was competent to defendant to plead and prove it, in order to show the illegality of the consideration; and the bond was held void by virtue of the 49 Geo. 3, c. 126.

Greville v. Atkins, 9 Barn. & C. 462.¶

If the defendant has paid the money before the day, he may, to debt on bond conditioned to pay *at a day certain*, plead *solvit ad diem*, and give in evidence payment *before* the day, as he could not plead it: for if the defendant were to plead payment before the day, the issue would be immaterial, as it would still leave the presumption open that there might be payment at the day. And therefore a difference is to be observed between pleading, where the condition of a bond is to pay *at a day certain*, and where *at or before* such a day: for to the first, the defendant may only plead *payment at the day*, for the reason now given; besides, that the performance of a condition ought to follow the terms of it: but to a bond payable *at or before such a day*, the defendant may plead *payment before the day*, for it is within the condition. And therefore where it was so pleaded, and the defendant demurred to it as an immaterial issue, the court overruled the demurrer, and laid down the rule to be, “That where the defendant pleads perform-

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ance of the condition, the plaintiff must assign an absolute breach, though it is not necessary where he pleads a collateral matter, as a release; and that, therefore, where the defendant had pleaded payment before the day, the plaintiff should have replied, that the money was not paid at the day mentioned in the plea, *nor at any time before, on, or after that day.*"

*Winch v. Pardon*, Mich. 1 G. 1, Bull. N. P. 174.  $\beta$  A tender of what is justly due on the bond, made after the day of payment, may be well pleaded in Connecticut. *Tracy v. Strong*, 2 Conn. 659. Tender *before the day of payment* may be made to a money-bond, payable on a particular day. *M'Hard v. Whetcroft*, 3 Har. & M'H. 85. Under the plea of *solvit ad diem* by the intestate, evidence of payment *post diem* by the administrator will not be received. *Denham v. Crowell*, Coxe, 467.  $\beta$  *Tryon v. Carter*, 2 Stra. 994; *Fletcher v. Hennington*, 2 Burr. 944; 1 Bl. R. 210, S. C.

But a tender and refusal of principal and interest at a subsequent day cannot be pleaded in bar under the statute, as not being within the equity of it; for such construction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice.

*Underhill v. Matthews*, Peach. 1 G. 1, C. B. Bull. N. P. 171.

A gave B a bond to secure an annuity, and, before any payment became due, A lent B a sum of money, on which it was agreed, that B should retain the payments of the annuity, as they became due, till that sum was discharged; then B became a bankrupt. The agreement to retain was holden to be a good plea to an action on the bond by B's assignees for the payments accruing after the bankruptcy; such agreement and retainer being equivalent to a plea of *solvit ad diem*.

*Sturdy v. Arnaud*, 3 Term R. 599.

If no interest has been paid on a bond for twenty years, it shall be in law presumed to be satisfied; and in such case the defendant may plead *solvit ad diem*, and rely on the presumption. Lord Raymond, indeed, left it to the jury on sixteen years, where there were circumstances to fortify the presumption. But without any circumstances a period of nineteen years and a half has been holden insufficient.(a)

1 Burr. 434; Cowp. 109; Oswald v. Legh, 1 Term R. 270.  $\parallel$ (a) But Lord Ellenborough held, that without some additional circumstance, as an intermediate settlement of accounts between the parties, less than twenty years would not raise a presumption of payment. *Coleseil v. Budd*, 1 Camp. 27. The presumption may be rebutted by proof of circumstances, accounting for no earlier demand having been made, as where the obligee resided abroad for twenty years. *Newman v. Newman*, 1 Stark. Ca. 101.  $\parallel$   $\beta$  In general, the lapse of twenty years after a right of action has accrued on a mortgage, bond, warrant of attorney, or other specialty, or from the time when a judgment was rendered, is presumptive evidence that such engagement or obligation has been discharged. *M'Dowell v. M'Cullough*, 17 S. & R. 51; *Jackson ex dem. Marvin v. Hotchkiss*, 6 Cowen, 401; *Barnett v. Emerson*, 6 Monr. 607; *Bailey v. Jackson*, 16 Johns. 210; *Hulke v. Pickering*, 2 Barnw. & Cress. 555; *Payne v. Dudley*, 1 Wash. 196; *Boardman v. De Forrest*, 5 Conn. 1; *Cohen's adm'r v. Thompson's ex'rs*, 2 Rep. Const. Ct. 146. But the presumption may be rebutted by proof of numerous facts, among which the following may be mentioned, namely: 1. An admission within twenty years that the debt is due and unpaid. 17 Serg. & Rawle, 51; *North v. Drayton*, 1 Harp. Ch. 34; *Goldhawk v. Duane*, 2 Wash. C. C. Rep. 323; *Blackburn v. Squib, Peck*, Rep. 60; *Cottle v. Payne*, 3 Day, 289. 2. Payment of interest, which is equivalent to an admission. 17 Serg. & Rawle, 53; *Sanders v. Meredith*, 3 Mann. & Ryl. 116. 3. The endorsement by the obligee on the obligation of a credit for interest, while the obligation was in full force, and before the presumption attached, *Roseboom v. Billington*, 17 Johns. 182; and the endorsement in the handwriting of the obligor, are good evidence to rebut the presumption, whether made before or after the presumption arose. *Boltz v. Bullman*, 1 Yeates, 584. 4. The presumption may also be rebutted by showing the debtor's inability to pay. *Dagget v. Tallman*, 8 Conn. 168; *Blackett v. Wall*, 3 Mann. & Ryl. 119. 5. The insolvency





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Where the plaintiff showed two writs of *testatum capias* sued out by him before the twenty years run, but not served, because defendant could not be found; Lord Mansfield said, there was no ground for the presumption.

*Moyle v. Lord Roberts*, cited in 1 Term Rep. 271.]

If the condition of an obligation be, that the defendant shall discharge or acquit, or free the plaintiff of or from such a bond, or rent, or action, or from any other particular thing ascertained in the condition, there the negative plea, *non damnificatus*, is not good, because the defendant hath undertaken to do an act in discharge of the plaintiff; but where the condition is only to free, or to discharge or indemnify the plaintiff from any damage, or cost, or trouble which shall or may happen by reason of such bond, rents or action, or other particular thing therein mentioned: in such case, the negative plea is sufficient, because it doth not appear that any damage hath happened to the plaintiff; and if no damages have happened, then it is impossible that the defendant should show in the affirmative the manner how he had freed or discharged the plaintiff; therefore it lies on the part of the plaintiff, by way of reply, to show wherein he was damnified.

*Carth.* 375.

[To debt on bond to save harmless, the defendant can only plead, either that he has saved the plaintiff harmless, or, that if he has received any injury it was through his own default.

*Holland v. Malken*, 2 Wils. 126.

Where the defendant pleads that he has saved the plaintiff harmless, he should show *how he has done so*. But as the saving harmless is the substance, and *how* matter of form, the plaintiff must take advantage of this defect in the plea by special demurrer.

*White v. Cleaver*, 2 Stra. 681.

{The want or failure of consideration cannot be pleaded in bar to an action on a bond.

2 Mass. T. Rep. 159; *Page v. Trufant*; 2 Johns. Rep. 177, *Vrooman v. Phelps*; *Ibid.* 179, n., *Dorlan v. Sammit*; 7 Term, 477; 4 East, 200.}

{*Non damnificatus* is not a good plea to debt on bond conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity.

*Holmes v. Rhodes*, 1 Bos. & P. 638; and vide 1 Will. Saund. 117, note (1), (5th edit.) β *Non damnificatus* is not a proper plea to an action on a bond, except one to save harmless and indemnify, *McClure v. Erwin*, 3 Cowen, 313, and cannot be pleaded when the condition of the bond is multifarious. *State Bank v. Chetwood*, 3 Halst. 1. See *Douglass v. Clark*, 14 Johns. 177; *Woods v. Rowan*, 5 Johns. 42; *Andrews v. Waring*, 20 Johns. 153; *Brent v. Davis*, 10 Wheat. 396; *Corporation of Washington v. Young*, 10 Wheat. 406.β

To debt on bond conditioned that the defendant should not open a shop within a certain distance of premises demised in a lease, the defendant pleaded, that he opened a shop by the license of the plaintiff; held, that such plea was bad on general demurrer, on the ground that a license after breach was not good unless by deed.

*Sellers v. Bickford*, 1 Moor, 468; and vide *Thomson v. Brown*, *Ibid.* 358; and tit. *Covenant*, Vol. II.

To debt on bond, with a condition for the performance by R G of all the covenants on his part, mentioned in an indenture bearing even date with the bond, and made or expressed to be made between the plaintiff and R G, the

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defendant cannot plead in bar that the indenture was never executed ; for he is estopped by the condition of the bond.

*Hosier v. Searle*, 2 Bos. & P. 299.

The condition of a bond, after reciting that the defendant and one Tuffnell had delivered and endorsed to the plaintiff, who had discounted the same, a bill of exchange drawn by Tuffnell, and accepted by Tyrell, was, that defendant and Tuffnell, or one of them, should pay to the plaintiff the sum mentioned in the bill within a month after it should become due, in case it should not be then paid to the plaintiff by the acceptor, according to the tenor of the bill. To an action on the bond, it was held not a good plea that the bill, when due, was not presented for payment to the acceptor, nor that due notice of the dishonour had not been given to the defendant and Tuffnell ; for the condition was absolute to pay the bill, in case it was not paid by the acceptor within a month after it was due ; and though the defendants would not have been liable on the bill without a presentment and due notice, yet their liability on the bond was not so qualified.

*Murray v. King*, 5 Barn. & A. 165.

Where the condition of a bond, after reciting that A, B, and C had filed a bill in equity against D and E, was, that the obligor should pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause ; it was held by three justices, (Abbott, C. J., *dubitante*,) that the death of E, one of the defendants, before any costs awarded, could not be pleaded in discharge of the bond.

*Kipling v. Turner*, 5 Barn. & A. 261 ; and vide *Arlington v. Merricke*, 2 Will. Saund. 415, (5th ed.), in a note to which case the decisions are collected as to securities being discharged by change of partners, or death of any of the parties for whose benefit they are made.

To an action on a bond given to plaintiff, as treasurer of a friendly society, the defendant pleaded that the rules of the society had not been confirmed at the quarter sessions, pursuant to 33 Geo. 3, c. 54. On demurrer, the plea was held bad ; for as the statute does not expressly avoid securities not registered pursuant to it, the bond was good at common law.

*Jones v. Woollam*, 5 Barn. & A. 769. ||

[See further, tit. "COVENANT," and tit. "SET-OFF;"] ||tit. "CONDITIONS." ||

## OFFICES AND OFFICERS.

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AN office is a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. (a) An officer is one who is lawfully invested with an office. (b)

(a) Shelf. on Mortm. 797; 3 S. & R. 149. (b) Bouv. L. D. h. v. g

- (A) Of the Nature of an Office, and the several kinds of Offices.
- (B) Offices, by what Authority created.
- (C) Who hath a Right of granting or assigning an Office: And herein of one Office's being incident to another.
- (D) Of the Grant of Offices by Ecclesiastical Persons.
- (E) Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.
- (F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus disposed of.
- (G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.
- (H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will, and Reversion.
- (I) Offices by whom to be executed, and who are incapable thereof.
- (K) Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Persons.
- (L) Of the Execution of an Office by Deputy: And herein of Superiors being answerable for their Deputies.
- (M) Of the Forfeitures of an Office.
- (N) Where for Corruption and oppressive Proceedings Officers are punishable: and herein of Bribery and Extortion.
- §(O) Of the civil Liability of the Officer. g

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(A) Of the Nature of an Office, and the several Kinds of Offices.

It is said that the word *officium* principally implies a duty, and in the next place the (c) charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer.

Carth. 478. (c) Signifies a place of trust, and therefore the statute 3 Jac. 1, c. 5, enacts, that no popish recusant shall exercise any office or charge. 5 Mod. 431.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, plough land, herd a flock, &c., which differ widely from that of steward of a manor, &c.

2 Sid. 142.

By the ancient common law, officers ought to be honest men, legal and sage, *et qui melius sciant et possint officio illi intendere*; and this, says my

(A) Of the Nature of an Office, and the several Kinds of Offices.

Lord Coke, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place only to grace the officer.

2 Inst. 32, 456.

Officers are distinguished into civil and military, according to the nature of their several trusts.

Carth. 479.

Officers are distinguished into those which are of a public, and those which are of a private nature. And herein it is said, that every man is a public officer, who hath any duty concerning the public; and he is not the less a public officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority.

Carth. 479.  $\beta$  Offices may be classed into civil and military:—1st, Civil offices are classed into political, judicial, and ministerial. 1. The offices of president and vice-president of the United States, of senators, of representatives, are political offices. 2. The judicial offices are those which are exercised in the administration of the law. 3. Ministerial offices are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior; as, the office of marshal, sheriff, and constable. Some offices are of a mixed nature, as that of sheriff, which is judicial in some respects and ministerial in others. 2nd, Military offices are those granted to persons who serve in the army or navy of the United States.

It hath been held, that the commissioners for purging corporations could not take notice of or remove an attorney of a court, it not being a public office in which the government was concerned.

Sid. 94, 152; Lev. 75; Keb. 349; Raym. 94; Hurst's case.

It hath been doubted whether the censor of the college of physicians be such an officer as is compellable to take the oaths prescribed by the statute 25 Car. 2, c. 2, it being urged that the oversight and inspection of medicines was of a private nature; and that no offices were within the intent of that statute but such as relate to the revenue, or to the conservation of the peace; and that particular powers created for particular purposes were not within that statute.

5 Mod. 431; Carth. 478, *The King v. Dr. Burrel*.  $\beta$  The appointment authorizing a person to publish the laws, acts, and resolutions of Congress is not an office incompatible with the office of alderman under the Constitution of Pennsylvania. *Commonwealth v. Binns*, 17 S. & R. 217.

Also, offices are distinguished into ancient offices, and those which are of (a) new creation. And herein it is observable, that constant usage hath not only sanctified the first establishment of such ancient offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have and are to continue to exist, in what manner to be exercised, how to be disposed of, &c.

9 Co. 97; Cro. Eliz. 636; 2 Roll. Abr. 189; Cro. Car. 513; 2 Co. 16; Show. 436. (a) No officer, that is constituted by act of parliament, hath more authority than the act that creates him, or some subsequent act of parliament doth give him; for he cannot prescribe as an officer at common law may do. 4 Inst. 267.

There is also another distinction of offices, into such as are judicial, and such as are ministerial offices only; the first relating to the administration of justice, or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern.

Jon. 109; Dav. 35; 9 Co. 97.  $\beta$  A ministerial officer can do no valid act, but such as he is either expressly or by implication authorized to do. *Vose v. Dean*, 7 Mass. 280.

(B) Offices, by what Authority created.

||(Vide as to Offices of Registrars of Admiralty, 50 Geo. 3, c. 118; as to Offices of the House of Commons, 52 Geo. 3, c. 11; as to Office of Works, 54 Geo. 3, c. 157; as to Offices of Clerks of the Signet and Privy Seal, 57 Geo. 3, c. 63; as to Offices in Irish Exchequer, 57 Geo. 3, c. 60; as to other Officers in Ireland, 57 Geo. 3, c. 62; as to Offices in Scotland, 57 Geo. 3, c. 64; as to Offices of Board of Trade, 57 Geo. 3, c. 66; as to Offices in the Mint, 57 Geo. 3, c. 67; as to the Office of Clerk of Parliament, 5 Geo. 4, c. 82.)||

(B) Offices, by what Authority created:  $\beta$  And herein of the Qualifications of the Officer.

1. *By what Authority created.* $\beta$

THE king is the universal officer and disposer of justice within this realm, from whom all others are said to be (a) derived; but yet he cannot create any new office inconsistent with our constitution, or prejudicial to the subject.

12 Co. 116; Roll. R. 206; Carth. 478. (a) Offices are said to be in the king, where the king may grant or nominate to the office, but hath not the office in him to use or execute. Co. Lit. 3 b; 2 Vent. 270; [1 H. 7, 29, Plowd. 381; 2 Bulst. 4; 8 Co. 55 b.]  $\beta$  By the Constitution of the United States, art. 2, s. 2, n. 2, it is provided that the President, "by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." $\beta$

$\beta$  In the absence of constitutional restriction, the creation, continuance, duties, and emoluments of an office, are matters of political expediency, and to be judged of solely by the legislature.

Hoke v. Henderson, 4 Dev. 1. $\beta$

There are three things, says my Lord Coke, which have fair pretences, yet are mischievous: 1st, New courts; 2d, New offices; 3d, New corporations for trade. And as to new offices, either in courts or out of them, these, he says, cannot be erected without act of parliament, for that under the pretence of the common good, they are exercised to the intolerable grievance of the subject.

2 Inst. 540.

An office granted by letters patent for the sole making of all bills, informations, and letters missive in the council of York, was held unreasonable and void.

Jon. 231, Mounson v. Lyster.

One Chute petitioned the king to erect a new office for registering all strangers within the realm, except merchant strangers, and to grant the said office to the petitioner with or (b) without a fee; and it was resolved by all the judges at Serjeants' Inn, that the erection of such new offices, for the benefit of a private man, was against all law, of what nature soever.

Co. 116, and several cases there cited to this purpose. (b) It hath been held clearly, that in the constitution of a new office or officer, it is not necessary that an annual or casual fee should at first be annexed to such office. Moor, 809.

King Edward IV., by his letters patent bearing date 10 Oct., anno 15 of his reign, reciting, that whereas there was no office of the chancellor of the garter, that there should be such an office of the chancellor of the garter, and that none should have it but the Bishop of Salisbury for the time being,

## (B) Offices, by what Authority created.

willed and ordained, that Richard Beauchamp, then Bishop of Salisbury, should have it for his life, and, after his decease, that his successors should have it for ever. And amongst divers other points it was resolved unanimously, that this grant was void; (a) for that a new office was erected, and it was not defined what jurisdiction or authority the officer should have, and therefore for the uncertainty it was void.

4 Inst. 200; Pasch. 6 Jac. 1, Bishop of Salisbury's case; Moor, 808, S. C. [The question, according to Moor, was, Whether the Bishop of Salisbury had, under this grant, *by succession*, such a title to the office, that he ought to be admitted to it? It appeared that Beauchamp accepted the office, executed it, and died Bishop of Salisbury in the 22d year of Ed. 4th; but there was no proof extant of any succeeding Bishop of Salisbury being admitted to the office, but the kings of England, one after another, had appointed chancellors at their pleasure. The three judges to whom the matter was referred, viz.: the Chief Justices Fleming and Coke, and the Chief Baron Tanfield, agreed in opinion and so reported to the king, that the bishop by *succession* had no title to the office, for two reasons: 1st. Because the patent originally was void as to the appointment of any succeeding bishop to the office, for Beauchamp took the estate for his life in the office in his natural capacity, not in his politic capacity; since if it had happened, that he had been removed from the bishopric of Salisbury, yet, in respect of the express limitation to him for his life, he must have continued in the office, and his successor in the see could not have taken it; then the consequence is, that he did not take an inheritance of succession in the office; and he could not take in his natural capacity for life, and also in his politic capacity; nor could the grant inure by such a fraction. Wherefore they all thought the grant void as to the succession. The other reason was, because there had been no use or exercise of this office by any succeeding bishops of Salisbury. But this state of facts, from which the above judgment was formed, does not seem to be correct; for, in truth, this office was enjoyed and executed by bishops of Salisbury from the time of the above grant to Richard Beauchamp to the reign of Edward 6th. Upon the reformation of the order by that king, his statutes wholly leave out the ecclesiastics, and appoint that the office shall be executed by one of the knights companions; and from that time till the reign of Charles 2, it remained in the hands of laymen. It appearing, however, that there were several charters granted to the see of Salisbury, particularly one in the 4th of Elizabeth, which confirmed charters of Queen Mary, King Henry 8th, and Henry 7th, and also another in the 4th of Charles 1, in which last the letters patent of Edward 4 are recited *totidem verbis*, and expressly confirmed, the pretensions of the see of Salisbury to the office were revived in the last-mentioned reign, and the claim was agitated in a chapter of the order, but the troubles which shortly afterwards followed prevented a decision. The claim, however, was renewed soon after the restoration, and at a chapter of the order in 21st of Charles 2, was allowed on the ground of the above grant. It was declared that the Bishop of Sarum, and his successors for ever, should have and execute the office of chancellor of the most noble Order of the Garter, and receive and enjoy all the rights, privileges, and advantages thereunto belonging, immediately upon the first vacancy. Ashmole's Institution, &c., of the Garter, c. 8, § 2.] (a) So, if the king grants an office by the name of an office *cum feodis inde spectantibus*, and it appears to the court to be new, the grant is void. 9 East, 4, 10; 2 Sid. 141.

The king cannot grant to any person to hold a court of equity, (b) though he may grant *tenere placita*; for the dispensation of equity is a special trust committed to the king, and not by him to be intrusted with any other, except his chancellor.

Hob. 63. (b) But it is said, that courts of equity may be holden by prescription, 4 Inst. 87, which implies a legal inconsistency, (unless we believe the royal authority to have varied in this respect at different periods,) since prescription, as a title to any franchise, pre-supposes a royal grant. It is also asserted, 4 Inst. 204, marg. Dav. 60 b, that counties palatine (to which courts of equity are thought incident, Hob. 63,) may be erected by the king without parliament. Chester, Durham, Lancaster, are said to be counties palatine by prescription. 4 Inst. 204. However, the doctrine in the text is supported by the resolution of many of the judges, amongst whom was Sir E. Coke, that the king cannot grant a commission to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had jurisdiction in such case immemorially, and had always such allowance by the law; but such commis-

(B) Offices, by what Authority created.

sioners, or new courts of equity, shall never have such allowance, but have been adjudged to be against law. 12 Co. 113. See 1 Wooddes. 188.]

[[By 6 Geo. 4, c. 95, it is enacted, "That it shall and may be lawful for his majesty at any time before the commencement of the next Michaelmas term, and during any succeeding vacation, from time to time, to cause a writ to be issued out of his majesty's High Court of Chancery, directed to any such person, being a barrister at law, as his majesty shall think fit, returnable immediately in the said court, commanding such person to appear in the said court, and to take upon himself the state and dignity of a serjeant at law; and such person shall and may thereupon forthwith appear before the Lord High Chancellor, Lord Keeper, or lords commissioners for the custody of the great seal for the time being, at such time and place as the said chancellor, keeper, or commissioners shall appoint; and such person so appearing, and taking the oaths usually administered to a serjeant at law, shall, without any further act or ceremony, be, and be deemed and taken to be, a serjeant at law sworn, to all intents and purposes."]]

Where a person claims to hold an office, his title to the office shall not come in question in an action to which he is not a party; but while he holds the office *de facto*, his acts and doings therein will be deemed good.

Fowler v. Bebee, 9 Mass. 231; Commonwealth v. Fowler, 10 Mass. 290; Nason v. Dillingham, 15 Mass. 170; Bucknam v. Ruggles, 15 Mass. 180; Beard v. Cameron, 3 Murph. 181; Lyon v. State Bank, 1 Stew. 442; Taylor v. Skrine, 2 Const. R. 696; Barret v. Reed, 2 Ohio, 410; Johnson v. Stedman, 3 Ohio, 96; Eldred v. Sexton, 5 Ohio, 216; Justices of Jefferson v. Clark, 1 Monr. 86; The People v. Collins, 7 Johns. 549; M'Instry v. Fanner, 9 Johns. 135; *Ex parte* Bollman et al., 4 Cranch, 75; Sawyer v. Steel, 3 Wash. C. C. R. 464; Willink v. Miles, Pet. C. C. R. 188; Keyser v. M'Kissam, 2 Rawle, 139; Riddle v. Bedford Co., 7 S. & R. 392; Neale v. Overseers, 5 Watts, 538; Baird v. Bank of Washington, 11 S. & R. 411; M'Kim v. Somers, 2 Penns. 297.

Evidence establishing the fact, that the officer issuing process is an officer *de facto*, is not merely *primâ facie* that he is an officer *de jure*; it is conclusive for a ministerial officer required to execute such process.

Wilcox v. Smith, 5 Wend. 231.

Where a collector of taxes justifies his acts as such collector, proof of his acting in that capacity, and general reputation, is *primâ facie* evidence of his authority, and, unless contradicted, is conclusive.

Eldred v. Sexton, 5 Ohio, 216.

If a constable be duly elected, takes the oath of office, and gives bond, he may justify acting as constable, although the obligee in the bond be not such as is required by law.

Barrett v. Reed, 2 Ohio, 411.

Evidence that a man was reputed to be a constable, and that he acted in that capacity, on a question involving the fact of his being a constable, is competent to prove such fact.

Johnson v. Stedman, 3 Ohio, 97.

An officer of the customs, duly commissioned, and acting in the duties of his office, is presumed to have taken the requisite oaths.

United States v. Bachelder, 2 Gallis. 15.

The Supreme Court of the United States has no control over the appointment or removal of a clerk of the District Court, nor can it entertain any inquiry as to the ground of removal.

*Ex parte* Duncan N. Hennen, 13 Pet. 230.

## (C) Who hath a Right of granting or assigning an Office.

When the office is elective, the election constitutes the essential part of the appointment, but the office is not duly filled till an acceptance of the trust, and, in some cases, not until an oath has been taken and a commission received.

*Johnson v. Wilson*, 2 N. H. Rep. 202.

When a temporary law which provides for the appointment of officers by the governor is continued by a subsequent law for a further period, the commissions of the officers endure only for the time to which the law was originally limited, unless there be something in the law which manifests an intent to take the appointment from the governor.

*Commonwealth v. Sutherland*, 3 S. & R. 145.

2. *Of the Qualifications of the Officer.*

In New York, a minor is incapable of holding a civil office; but the officer whose duty it is to administer the oath cannot refuse to administer such oath, on that ground.

*The People v. Dean*, 3 Wend. 438.

In that state the act to suppress duelling, passed Nov. 5, 1816, sess. 40, c. 1, which declares that a person challenging another to fight a duel, &c., "shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under this state," is constitutional.

*Barker v. The People*, 3 Cowen, 686.

One who has a discretionary authority to appoint a fit person to office, cannot appoint himself.

*Commonwealth v. Douglass*, 1 Binn. 77.

The conviction and sentence of a sheriff for bribing a voter previous to his election, is not such a "conviction of misbehaviour in office, or of any infamous crime," as will disqualify him, under the Constitution of Pennsylvania, from exercising the duties of the office.

*Commonwealth v. Shaver*, 3 Watts & S. 338.*g*

## (C) Who hath a Right of granting or assigning an Office: And herein of one Office being incident to another.

WHEREVER one office is (a) incident to another, such incident office is regularly grantable by him who hath the principal office. On this foundation it hath been held, that the king's grant of the office of county-clerk was void, it being inseparably incident to the office of sheriff, and could not by any law or contrivance be taken away from him.

4 Co. 32, *Mitton's case*. (a) If a house or land belong to an office, by the grant of the office by deed the house or land passeth, as belonging thereto. Co. Lit. 49 a; *Vaugh.* 178, cited.

So, the office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; and therefore a grant of the office of marshal with a reservation of the office of chamberlain, is void.

2 Salk. 439, pl. 3. *Per Holt*, C. J., *Leon*. 320, 321, like point.

So, it hath been resolved, that the office of exigenter of London and other counties in England, is incident to the office of C. J. of C. B., and that therefore a grant thereof by the king, though in the vacancy of a chief justice, is null and void.

*Dyer*, 175 a, pl. 25, and 152; and vide *Show. Par. Ca.*, *Sir Rowland Holt's case*.



## (D) Of the Grant of Offices by Ecclesiastical Persons.

My Lord Coke says, that the justices of courts did ever appoint their clerks, some of which after by prescription grew to be officers in their courts; and this right which they had of constituting their own officers, is further confirmed to them by Westm. 2, 13 Ed. 1, c. 30, the reasons whereof are twofold. 1st. For that the law doth ever appoint those who have the greatest knowledge and skill, to perform that which is to be done. 2dly. The officers and clerks are but to enter, enrol, or effect that which the justices do adjudge, award, or order; the insufficient doing whereof maketh the proceedings of the justices erroneous, than the which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party.

Inst. 425; 4 Mod. 173, cited.

||The appointment to the office of clerk of the peace is in the *custos rotulorum* of each county, and not in the crown; and the King's County in Ireland forms no exception.

Harding v. Pollock, 6 Bing. R. 25, in *Dom. Proc.* This judgment is according to the opinion of the judges, except Bayley, J., who dissented. *Qu.* Whether the profits of this office are assignable? 3 Swanst. 173.

## (D) Of the Grant of Offices by Ecclesiastical Persons.

HERE it will be proper to take notice how far bishops, and other ecclesiastical persons may grant offices to bind their successors, and how far not: wherein the rule is, that such offices as are ancient, and of necessity to be exercised by some other person, they may grant, together with the ancient fee for exercising thereof; and as these offices are not within 32 Hen. 8, c. 28, to be granted by the bishops or other ecclesiastical persons solely; so neither are they construed to be within the restraint of 1 Eliz. c. 19, and 13 Eliz. c. 10, and therefore remain perfectly at the common law, and, by consequence, to bind the successors, must be confirmed in the same manner as all other grants or alienations of ecclesiastical persons at common law must have been. These grants appear generally to have been made for the life of the grantee; for it were too severe and rigid a construction to confine them to be made determinable on the death, translation, or other promotion of the bishop, dean, &c., who made them; and would discourage men of ability and capacity to undertake the exercise thereof; and to grant such offices for twenty-one years, or any other term of years, would introduce many inconveniences, by letting in executors, strangers, and other unqualified persons to the exercise thereof; and therefore any grant of such offices for years, seems against the policy of the common law and the benefit of the successors, which those statutes intended to provide for, and by consequence will not bind them.

Co. Lit. 44 a; Co. 58, 61, Bishop of Sarum's case; Cro. Car. 49; Ley, 71, 79. [Notwithstanding what is said here and in several other cases concerning the *necessity* of the office, yet that point is not at all material. For it hath been determined upon solemn hearing, that an office and fee which existed before the first of Eliz., are not within the restraint of that statute, but that they may be granted as before the statute; and that the utility or necessity of the office is not more material since than it was before the statute. Sir John Trelawney v. The Bishop of Winchester, 1 Burr. 219.

But if such offices have been anciently granted to one for life, this induces no necessity of their being granted to two for their lives; and therefore such grant to two for their lives, will not bind the successors, though one of the grantees should die in the life of the grantor, so as there were but one life in being against the successor: because by such grant to two, the grant was faulty in its foundation, and therefore shall not be helped by any accident

## (D) Of the Grant of Offices by Ecclesiastical Persons.

after. So if the office have been anciently granted to one with an ancient fee, and after a grant is made to another in reversion, after the death of the first grantee; this shall not bind the successor, for there can be no necessity urged to justify this; besides that, the grantee in reversion, by sickness or other accident, may become incapable to exercise such office before it comes into possession; and if the bishop, or other spiritual person, might grant such offices to two, or grant them in reversion, they might abuse that power, and grant them to twenty, or for twenty lives in reversion one after another, which as they cannot be justified from any necessity, so they would be inconvenient, by tying up the successor's hands from choosing such officers as he thought necessary and proper for the discharge of such offices; and therefore no confirmation will make good such grants against the successor.

10 Co. 61; Cro. Car. 49; 11 Co. 4.

The Bishop of Norwich having the office of high steward of his courts, to which a fee of 10*l.* *per annum* appertained, and also the office of under steward of the same court, to which a fee of 4*l.* *per annum* appertained, granted the office of under steward to three for their lives, whereof one was within age, and the other two being dead, the infant grants over the office to the defendant, and then the bishop grants both these offices to the plaintiff, with the fees. By the books both these grants seem to be void: the first, because it was granted to three, where the custom warranted a grant thereof only to one; and also, because the surviving grantee was an infant, and so not capable of a judicial office, as the steward of a court is. The second, because both were granted to one person, where they had usually been granted to two severally, with distinct fees, and therefore the grant of both to one person neither necessary nor convenient, and, by consequence, not binding against the successor. Also, such grant of either the said offices in reversion would not bind the successor, for the reasons before given.

Cro. Eliz. 636, *Scambler v. Watts*; 10 Co. 61; Cro. Car. 50; *Ley*, 74; *Dyer*, 80 b, in margin.

But, although the bishopric, deanery, &c., were founded but of late times, yet the grant of such offices as are necessary, and cannot be exercised by the bishop, dean, &c., in person, may be allowed, together with a reasonable fee for the exercise thereof, (the reasonableness whereof the court where the cause depends is to be judge;) for these cannot be said to tend to the impoverishment of the successor, but rather for his benefit, by providing officers fit and qualified to take care of the revenues; and therefore such grants are not within the restraint of 1 Eliz. c. 19, and 13 Eliz. c. 10; but not being warranted by 32 H. 8, c. 28, they must be confirmed by all persons interested therein; because they remain at common law, untouched by any of the statutes.

10 Co. 61 b; Cro. Car. 48; 2 Brownl. 137, *Bishop of Ely's case*; *Ley*, 78, 80.

In an action upon the case, for disturbing the plaintiff in his office of registrar to the Bishop of Bristol, which was a new bishopric taken out of the bishopric of Sarum, and founded in the time of Hen. 8, and which had been granted *separalibus temporibus* after the foundation, to one and his assigns for three lives, &c., these differences were taken and agreed to by the court. First, That the bishop of a new bishopric may grant offices of necessity for life. Secondly, If an office hath been usually granted by the bishop of a new bishopric, for three lives, with the consent or confirmation of the dean and chapter,(a) before 1 Eliz. c. 19, it may be now granted

## (D) Of the Grant of Offices by Ecclesiastical Persons.

accordingly. Thirdly, Be the bishopric new or old, if it was not so granted, but granted always before 1 Eliz. c. 19, for one or two lives, it cannot be granted by the bishop after 1 Eliz. c. 19, for three lives. Fourthly, If it was granted before 1 Eliz. c. 19, for three lives, and after the statute but for one life, yet this shall not abridge the power of the bishop, but he may grant it for three lives, &c. And in the principal case, the verdict finding that it had been granted *separalibus temporibus* after the foundation to one and his assigns for three lives, was held defective, because it might be so granted after the foundation, and yet be after 1 Eliz. c. 19, and therefore a *venire facias de novo* was awarded to supply that defect.

2 Lev. 136; 3 Keb. 472, 506, *Ridley v. Pawnal*. (a) Cro. Car. 258, 279; Jon. 311; March, 38, *accord.*, that such grant before 1 Eliz. is a badge of their having been anciently so granted.

The Bishop of Chichester was seised in fee of a park in right of his bishopric, and had the office of park-keeper, which he by deed 44 Eliz. granted to the defendant for his life, *et ulterius concessit pro executione officii predicti*. five marks, with a clause of distress, *una cum a livery*, or 13s. 4d. *per annum, nec non pasturam pro duobus equis* in the said park yearly, *una cum* the windfalls, with clause of distress for the said rent, or annuity of five marks, and livery, or 13s. 4d.; and this grant was confirmed by the dean and chapter; and for non-payment of the five marks the defendant distrains, and avers the office and fee of five marks to be anciently granted, but makes no averment for the residue. The plaintiff, in bar of the avowry, pleads the statute 1 Eliz. c. 19, and says, that the pasturage was never granted before, and derives a title to himself under the present bishop, successor to the grantor. In this case it seems to be agreed by all, that if the new additional fees had been in another clause, distinct from the grant of the office and five marks; or had been granted for another consideration; or, if the bishop had granted the office and five marks for him and his successors, and had granted the pasturage, and other additional fees, during his own life only; that in these cases the grant had been good, for the ancient office and fee, to bind the successor, but not for the additional fees: or, if the grant of the office had been with a fee of 5*l.*, where the ancient fee was but five marks, there, the grant being entire, would have been void *in toto* against the successor: but whether these grants were distinct or entire seemed the only dispute in the case; wherein the court was divided—two judges holding that they were several and distinct, and two, that they were entire and depending on each other, and therefore void in the whole against the successor. But a variation in the days of payment of the ancient fee, as if it were formerly payable at one day, and be now reserved payable at two, will not vitiate the grant.

Bridg. 30, 32; Cro. Car. 47; Ley, 71, *Bishop of Chichester v. Freeland*; Cro. Car. 16; *Cook v. Younger*, Ley, 75.

In *replevin*, defendant avows upon a grant to him by the dean and chapter of, &c., of the office of catership of the church for life, with an annuity of 6*l.* *per annum*, for the exercising thereof, and a clause of distress; and avows for the annuity, and avers that it was an ancient office pertaining to the dean and chapter, &c., but does not aver that the annuity was an ancient annuity, the defendant pleads 13 Eliz. c. 10, &c., and shows the death of the dean grantor, and the election of another, &c., and upon demurrer adjudged, that the grant was void.

Brownl. 182, *Humphrey v. Parcel*.

## (D) Of the Grant of Offices by Ecclesiastical Persons.

The Bishop of Llandaff, in 1672, granted the office of chancellor of his diocese to A and B and the survivor of them for life, and this was confirmed by the dean and chapter; and now A being dead it became a question, Whether this grant to two were good against the successor? And the court held, that if it had been anciently so granted, it would bind the successor; and to prove it anciently so granted, four grants were produced, three of which were made in the time of one bishop, and the last in the year 1620, from which time to this present grant in 1672 no such grant to two had been made; and the first of these grants was about fifty years after 1 Eliz. c. 19, yet the court held this sufficient evidence to prove this office anciently grantable to two, before the statute 1 Eliz. c. 19, (as the prescription must be to warrant it;) and one Ridley's case was mentioned of the office of registrar of Bristol, wherein my Lord Hale was of opinion, that if it could be shown that such grants were made some time after the first Eliz. c. 19, it would be an evidence that such were also made before the statute; and upon a special verdict finding this matter, the court gave judgment accordingly, that the grant was sufficiently warranted by ancient usage, and had no great regard to the objection of its being a judicial office, which cannot by law be granted to two, being supported by such usage, and no diminution of the successor's revenue, which those statutes were made to secure.

4 Mod. 16, 17, 18, Jones v. Bean; Show. 288; 12 Mod. 10; 2 Salk. 465, pl. 1; Carth. 213; *Supra*, 2 Lev. 136.

Some hold that when such ancient office and ancient fee are granted together, with some new additional fees, yet, if the distress and avowry be only for the ancient fee, that the avowant need only make averment, for that fee for which he distrains, that it was ancient; and the plaintiff, if the other fees were new, ought to show it in avoidance of the grant; for the avowry, being only for the ancient fee, needs meddle with no more, that being only in question.

10 Co. 58, 9. But *quære*; for others hold that the avowant ought to make averment for all, because he is in the nature of a plaintiff, and is to make a title. Vide Cro. Car. 48, 49, 50; Ley, 73, 77.

In an action upon the case, for disturbing him in the exercise of the office of commissary of the Bishop of Lincoln, and of official to the archdeacon of Leicester, upon not guilty pleaded, it was found that these were ancient offices of judicature, always granted to one person for life, the one by the bishop, and the other by the archdeacon, till 1609, when they were granted by the bishop and archdeacon severally to A and B for their two lives: and after 1614, were likewise granted to B and C, with confirmation of the bishop's grant, by the dean and chapter, and of the archdeacon's grant by the bishop, dean and chapter; and that after the death of that bishop and archdeacon, their successors severally granted both the said offices to the plaintiff; who, being disturbed by C, brought this action and had judgment; for all the court held these offices parcel of the possessions of the bishopric and archdeaconry, and expressly within the word *hereditaments* in the 1 Eliz. c. 19, and 13 Eliz. c. 10, and therefore being usually granted in possession, the grant thereof in reversion is without warrant, and no necessity can be urged for so doing; and the acceptance by B of the second grant, where C was joined, was no surrender of the first, and, by consequence, the respective successors were not bound by these grants, but might lawfully, as they have done, grant both these offices to the plaintiff for his life; and therefore he had judgment.

Cro. Car. 258; Jon. 263, Walker v. Sir John Lamb.

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But where the office of registrar of a bishop hath been usually granted as well in reversion as in possession, there a grant to one of such office for life, where by the death or surrender of the present officer it shall become void, is good, and shall bind the successor, and is not within the restraint of either of the said statutes; because, being usually so granted, it might proceed at first from a reason of convenience and necessity, that the office might always be kept full, and a person always ready to execute it, for the benefit of the king's subjects; for though there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habend.* after the death of the present officer; which is no more than a provision of a person to supply it, when it becomes void; and if such provision has been usually made, the custom and usage gives sanction to it. But then such grant must be confirmed, as is said before; and therefore, where some books hold such grant of offices in reversion not good, it must be taken with this diversity, that they have not usually been so granted, but only in possession, and then to grant them in reversion is not warranted by the custom, nor shall bind the successor.

Cro. Car. 279, 555; Jon. 310; 2 Roll. Abr. 153, *Young v. Stowel*; March, 38; 3 Leon. 31; 4 Mod. 279.

But in the last case, where the office of registrar was granted by the bishop to an infant, then about eleven years of age, *habend.* after the death or surrender of the present officer, *exercend. per se vel suffic. deput. suum cum vadiis*, &c., and when the tenant for life died, the grantee in reversion was then thirty years of age; all the court held his infancy, at the time of the grant, no cause to avoid it; because, at the time it fell into possession, he was of sufficient age to execute it; and though it had fallen vacant during his minority, yet, as this case is, the grant would have been good, because it is to be exercised *per se vel per suffic. deputat.*, &c., and therefore though he were not capable of exercising it himself, (as writing and a little Latin would sufficiently qualify him for, it being only to write and register acts done in court,) yet he might have put in a sufficient deputy; and therefore they denied the opinion, Co. Lit. 3 b, that the grant of the office of steward of the court of a manor, either in possession or reversion, to an infant was void, as incapable and wanting knowledge to exercise it, unless it were to be understood that there was no clause of exercising it, *per se vel sufficit deputat.*, and that the infant himself was of such tender age, that by no indentment he was incapable of exercising it himself. But they held, that (a) if there was such clause, then it would be good, and he might appoint a sufficient deputy: and if he did not, it would be a forfeiture of his office, notwithstanding his infancy; and of the sufficiency of the deputy the lord of the manor, or judge of the court, were to be judges; and if the deputy should misdeemean himself, or prove unskilful in his office, it would be a forfeiture at the infant's peril; and this seems to be the diversity taken in the books. Besides, if the case in Co. Lit. be meant of the office of steward of a court-leet, it may be good law, because that is a judicial office, which perhaps cannot be executed by deputy; but, if it be meant of a court-baron, then, the general opinion of the (b) books is against it, which hold, that the steward of a court-baron may make a deputy, though there were no express power given him for that purpose; for that it is an office purely ministerial, (for the suitors are judges in the court-baron,) and consists in entering plaints, surrenders, admittances, &c., in the nature of a registrar; and though an infant should have the stewardship of both courts, viz.: the court-leet and

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court-baron together, and that he should be incapable to exercise that of the court-leet, and therefore the grant thereof to him should be void; yet for the court-baron the grant would continue good, and he might either exercise it in person or by a sufficient deputy. And perhaps upon this diversity the books may be reconciled; for they agree, that if an office of judicature or learning be given to a man utterly incapable of it, no clause of exercising it by deputy, or otherwise, will mend the case, or make the grant good; for it must radically vest in the grantee before it can go in title of procuracion, or deputation to another.

Cro. Car. 279, 555, 557; Jon. 310; 2 Roll. Abr. 123. (a) Vide Cro. Ja. 18; Hob. 148; 11 Co. 87; 8 Co. 44. (b) Vide 2 Co. 48, 49; 2 Lev. 245; 2 Jon. 126; Hob. 148; 19 Co. 87; Cro. Ja. 18. ¶But it is now decided that the steward of a court-baron is a judicial officer. *Holroyd v. Breare*, 3 Barn. & A. 473.]

But where the dean of Windsor having ordinary jurisdiction, by deed made such a one his commissary, which was confirmed by the dean and chapter, yet, after his death, it was held the successor was not bound thereby, because this was a judicial office and authority; which, though it may be exercised by a substitute, yet it is in law in the ordinary himself; and though excommunication, probate of testaments, and such like, may be transacted by the commissary, yet it must be in the name of the ordinary, and if the substitute offends the ordinary shall be punished. And therefore this grant can continue no longer than the ordinary himself who grants it; for if it should bind the successor, then he could not remove him, though he were answerable for his acts and offences, which would be hard; therefore this grant determines with the death or remotion of the ordinary, and then no confirmation can make it good after; and the archbishops, in their several provinces, have the ordinary jurisdiction *sede vacante*: and the archbishop, dean and chapter, cannot grant the jurisdiction of guardian of the spiritualities after the death of the bishop; which is a stronger case.

Noy, 153, *Prebend of Hatcherley's case*; 17 E. 3, 23.

¶See 10 Geo. 4, c. 53, an act to regulate the duties, salaries and emoluments of the officers, clerks, and ministers of certain ecclesiastical courts in England.¶

(F) Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.

WHEREVER the right of granting and erecting new offices is vested in the king as the head and fountain of justice, he must use proper words for that purpose; as, in the erection of a new office the words *erigimus*, *constituimus*, &c., must be made use of; and it hath been adjudged, that the word *concessimus* is not sufficient, unless there be an office already in being, and then a grant by the word *concessimus* is good.

Roll. Abr. 130; Co. 191; 2 Sd. 137; Dyer. 300 b. pl. 62; Hardw. 351.

If an officer be created by letters patent, he is a complete officer before he is sworn, and before any investiture.

Mod. 122. ¶When a commission is signed by the President and transmitted to the Secretary of State to be sealed and recorded, it is irrevocable, and the President cannot lawfully require the Secretary to withhold it, except when the officer holds the office at the will of the President. *Madison v. Madison*, 1 Cranch, 13; *Justices of Jefferson v. Clark*, 1 Mart. 56. The commission is not an appointment, but only evidence of it. 2 N. & M. 339.

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But if a person be created at herald at arms, investiture is necessary before he is a complete officer.

Leon. 248; Mod. 123; *Cont. Roll.* Abr. 154.

An office being a thing which lies in grant, cannot regularly be granted or transferred from one to another but by deed duly executed, which is an instrument the law hath appointed instead of livery.

Leon. 219; 3 Mod. 147; 5 Mod. 388.

But it is said, that one may retain (a) a steward to keep his court-baron and court-leet without deed, and that such retainer shall continue until he be discharged.

Co. Lit. 61 b. [Some have thought, that stewards without deed cannot take surrenders out of court. Godb. 142, and 1 Ld. Raym. 159. But this hath been frequently denied, and indeed seems unsupported by any good reason. Cro. Ja. 526; Com. R. 83; Hargr. Co. Lit. 59 a, n. 6. (a) That a corporation may make a bailiff without deed, tit. *Corporations*, Letter (E). [But a patent is necessary to the making of stewards of the king's manors. Co. Comp. Cop. 56, § 45.]

Also it hath been adjudged, that a parol appointment of clerk of the peace by the *custos rotulorum*, by the words following, spoken in open court, is good. *I do nominate the said Philip Owen to be clerk of the peace according to the act of parliament.* But in B. R., though the parol appointment was held good, yet that court reversed the judgment, because the form of the words used in the nomination were insufficient; for he did not name any certain county of which he should be clerk of the peace; nor distinguish which statute he intends; for there are two statutes which concern this matter, viz.: 37 H. 8, c. 1, § 3, and 1 W. & M. stat. c. 21, § 5, and moreover by his adding this word, viz.: said Philip Owen, it is altogether insensible. But the judgment of B. R. was reversed in the House of Lords.

Carth. 426; 2 Salk. 467, pl. 4; 5 Mod. 386, *Sanders v. Owen*; 12 Mod. 200, S. C.; Lill. Entr., 278, S. C.

||In stating in pleading a party's appointment to a voluntary office not cast upon him by law, it seems necessary also to allege his acceptance of the office.

*Serra v. Wright*, 6 Taunt. 45; and vide *Rex v. Radley*, Forr. 150.]]

By the 13 Car. 2, stat. 2, c. 1, it is enacted, "That no person shall be placed, elected, or chosen to any office or place of mayor, alderman, recorder, bailiff, town-clerk, common councilman, or other office of magistracy, place of trust, or other employment relating to the government of any city, corporation, borough, cinque-port, or other port-town, who shall not have received the sacrament according to the rites of the Church of England within one year next before such election; and that every person so placed or elected shall take the oath of allegiance and supremacy at the same time when the oath for the due execution of the said office, &c., shall be administered; and that the said oaths shall be administered and (b) tendered by those who administer the oath of office; and in default of such, by two (c) justices of peace of the corporation; and that in default hereof every such election, placing, and choice shall be void."

13 Car. 2, st. 2, c. 1. (b) It hath been adjudged, that it is no excuse that the oaths were not tendered. 5 Mod. 316; 2 Johns. 121; Salk. 428. (c) Which makes it necessary in a return to a *mandamus*, setting forth that the party did not take the oaths before the mayor, &c., to add, that he did not take them before two justices of peace. 5 Mod. 317; 2 Salk. 428, pl. 3.

[But now by stat. 5 Geo. 1, c. 6, for quieting and establishing corporations,

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it is enacted, "That all persons in the actual possession of any office that were required by the above act to take the sacrament within one year next before their election into such office, shall be confirmed in their several offices, and shall be indemnified and discharged from all incapacities and penalties arising from such omission; and that none of their acts shall be questioned by reason of such omission; nor shall any persons who shall be hereafter placed or elected in or to any of the offices aforesaid, be removed by the corporation, or otherwise prosecuted for or by reason of such omission; nor shall any incapacity, disability, forfeiture, or penalty, be incurred by reason of the same, unless such person be so removed, or such prosecution be commenced (a) within six months after his election."

5 G. 1, c. 6. (a) If neither of these events have happened within the time limited, the election becomes absolute and unavoidable; for the statute operates rather as a protection to the possession, than as a bar to the remedy. 1 Black. R. 229; 2 Burr. 1013; Cowp. 539.

However, by 1 Geo. 1, stat. 2, c. 13, amended by 2 Geo. 2, c. 21, and 9 Geo. 2, c. 26, all persons who bear any office, civil or military, &c., shall take the oaths of allegiance and supremacy, (b) and the oath of abjuration. And all persons who were before, shall still continue, obliged to receive the sacrament; and shall subscribe the doctrine against transubstantiation. And by 11 Geo. 1, c. 4, § 4, mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths by law required at the time of their admission into such office, *before* such officer as shall preside at such election.

(b) As recited in 6 G. 3, c. 53.] [See 5 G. 4, c. 109, enabling the Earl-Marshall to execute his office without taking oaths, except that of allegiance and the oath of office. For the act enabling Roman Catholics to sit in Parliament, and to hold offices, without taking the oaths in the text, see *post*, tit. *Papists*, &c.]

By the 25 Car. 2, c. 2, (commonly called the Test Act,) it is enacted, "That all officers civil and military, (except those of inheritance appointing sufficient deputies,) and all who have any fee, &c., by patent from the king, (except such as shall be granted for valuable consideration for life or years, and not relate to any office or place of trust,) and also all who have any place of trust or employment in the king's household, shall take the oaths of allegiance and supremacy, and test, the next term, (in the King's Bench or Chancery, or quarter sessions,) and receive the sacrament within three months, and give in a certificate thereof, proved by two witnesses, to the court wherein they take the said oaths; and in case of neglect, shall be disabled to hold the said offices, &c., and (c) forfeit five hundred pounds, except feme covert, &c."

25 Car. 2, c. 2. [The acts which are annually passed to indemnify persons in office who have omitted to qualify themselves, have the effect of repealing this salutary statute.] (c) It hath been adjudged, that the persons so disabled lose only their right to the profits of their offices from the time of such disability, but that they lose nothing vested in them before. Lutw. 910.

But it is provided by the last mentioned statute, "That the said act shall not extend to constables or churchwardens, or (d) such like inferior civil officers, or to a bailiff of a manor or lands, or such like private officers."

(d) It hath been made a *quære*, Whether it extends to the censor of the College of Physicians? 5 Mod. 431.

Though the words of the above act of 13 Car. 2 are so very strong as to make such election, &c. void, and those of the 25 Car. 2, to make such persons disabled in law to all intents and purposes whatsoever, to have, occupy,



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or enjoy the said offices; yet it hath been strongly holden, that the acts of one under such a disability, being instated in such an office, and executing the same without any objection to his authority, may be valid as to strangers; for otherwise, not only those who no way infringe this law, but even those whose benefit is intended to be advanced by it, might be sufferers for another's fault, to which they are no way privy; and one chasm in a corporation, happening through the default of one head officer, would perpetually vacate the acts of all others, whose authority in respect of their admission into their offices, or otherwise, may depend on his.

2 Jon. 81, 137; 2 Lev. 184, 242; 2 Mod. 193; 3 Keb. 606, 665, 682, 721; Hawk. P. C. c. 8; 10 Mod. 185; Ld. Raym. 299.

[The design of the statute of 13 Car. 2 was to exclude men, who were not of the Church of England, from all offices which concern the government; and is to be considered as prohibitory upon the electors *quoad* such persons. A dissenter therefore being ineligible to such office, cannot *of course* be fined for refusing to accept it. Upon this simple point, however, there hath heretofore been some difference of opinion.<sup>(a)</sup> And it became necessary to appeal to the court of sovereign jurisdiction, in order to settle the law upon it. That was done in the case of *Harrison v. Evans*,<sup>(b)</sup> which case was as follows:—In 1748, the corporation of London, by a by-law, imposed a fine of six hundred pounds upon every person, who, being elected, should refuse to serve the office of sheriff. The plaintiff, the Chamberlain of London, levied debt in the sheriff's court against the defendant for the penalty. The defendant pleaded the 13 Car. 2, averring that he was a Protestant dissenter within the toleration act 1 & 2 W. & M. c. 18, of scrupulous conscience; and therefore had not received the sacrament. The plaintiff replied the 5 G. 1, which confirms members of corporation in their respective offices, although they have not received the sacrament according to the directions of 13 Car. 2. To this replication the defendant demurred, and judgment was given upon it in favour of the city. The defendant appealed to the Court of Hustings, where the judgment was affirmed. A special commission was sued out, directed to Willes, C. J., Parker, C. B., and Foster, Bathurst, and Wilmot, Js., by whom the judgments in the courts below were unanimously reversed. The plaintiff brought a writ of error in parliament; and the 4th of February, 1767, Lord Mansfield with five other judges, against Perrot, B., were of opinion, that upon the facts admitted by the pleadings in this cause, the defendant should be allowed to object to the validity of his election to the office of sheriff, in bar to the action, by reason that he had not taken the sacrament within the time limited.

(a) *Larwood's case*, 1 Ld. Raym. 29; 4 Mod. 269; *Guilford Town v. Clark*, 2 Vent. 247; *Rex v. Grosvenor*, 2 Stra. 1193; 1 Wils. 18. (b) 2 Burn's E. L., (8vo. ed. 185;) 6 Br. P. C. 181.]

[[By the annual Indemnity Act,<sup>(c)</sup> for quieting the minds of his majesty's subjects, and for preventing any inconveniences that might otherwise happen by means of omissions to take the oaths, &c. required by law, it is enacted, "That all and every person or persons who, at or before the passing of this act, hath or shall have omitted to take and subscribe the oaths and declarations in the act mentioned, or to receive the sacrament of the Lord's Supper, or otherwise to qualify him, her, or themselves, within such time, and in such manner, as in and by the said recited acts, or any of them, or by any other act of parliament in that behalf made, is required; and who, after accepting any such office, place, or employment, or undertaking any

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profession or thing, on account of which such qualifications ought to have been had, and is required before the passing of this act, hath or have taken and subscribed the said oaths, or made the declarations required by law, and also received the sacrament of the Lord's Supper, according to the usage of the Church of England; or who, on or before the 25th day of March, one thousand eight hundred and fifteen, shall take and subscribe the said oaths, declarations and assurance respectively, in such cases wherein by law the said oaths, declarations, and assurance ought to have been taken and subscribed, in such manner and form, or at or in such place or places as are appointed in and by the said act, made in the first year of the reign of his said late majesty king George the First, or by any other act or acts of parliament in that behalf made and provided, and also hath or have received, or shall, on or before the said 25th day of March, 1815, (then next,) receive the sacrament of the Lord's Supper according to the usage of the Church of England, in such cases wherein the said sacrament ought to have been received; and hath or ought to (d) have made and subscribed, or shall, on or before the said 25th day of March, one thousand eight hundred and fifteen, make and subscribe the said declaration against transubstantiation; and also hath or have made and subscribed, or shall, on or before the said 25th day of March, one thousand eight hundred and fifteen, make and subscribe the said declaration in the said statute made in the thirtieth year of King Charles the Second, in such cases wherein the said declaration ought to have been made and subscribed; or take and subscribe the oath directed by the said act made in the 18th year of the reign of his late majesty King George the Second, in such cases wherein the said oath ought to have been taken and subscribed, in such manner as by the said act is directed; shall be and are hereby indemnified, freed, and discharged, from and against all penalties, forfeitures, incapacities, and disabilities incurred, or to be incurred for or by reason of any neglect or omission previous to the passing of this act, of taking or subscribing the said oaths or assurance, or receiving the sacrament, or making or subscribing the said declaration, or taking or subscribing the said oath according to the above mentioned acts or any of them, or any other act or acts; and such person or persons is and are, and shall be fully and actually recapacitated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be deemed and adjudged to have duly qualified him, her, or themselves, according to the above-mentioned acts, and every of them, and that all elections of, and acts done or to be done by any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity as the same or any of them would have been if such person or persons respectively had taken the said oaths or assurance, and received the sacrament of the Lord's Supper, and made and subscribed the said declaration, and taken and subscribed the said oath according to the directions of the said acts, and every or any of them; and that the qualifications of such person or persons qualifying themselves in manner and within the time appointed by this act shall be, to all intents and purposes, as effectual as if such person or persons had respectively taken the said oaths and assurance, and received the sacrament and made and subscribed the said declaration, and taken and subscribed the said oath, within the time and in the manner appointed by the several acts before mentioned."

(c) The last annual indemnity act is 10 G. 4, c. 12. The act is prospective as well as retrospective, and extends to those who may be in default during the time for which

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it is made, as well as those who had incurred penalties before it passed. *In re Stevenson*, 9 Barn. & C. 34. (d) *Qu.* the words *ought* to?

By 9 Geo 4, c. 17, intituled *An act for repealing so much of several acts as imposes the necessity of receiving the sacrament of the Lord's Supper as a qualification for certain offices and employments*, it is enacted, "That so much and such parts of the said several acts passed in the thirteenth and twenty-fifth years of the reign of King Charles the Second, and of the said acts passed in the sixteenth year of the reign of King George the Second, as require the person or persons in the said acts respectively described to take or receive the sacrament of the Lord's Supper according to the rites or usage of the Church of England, for the several purposes therein expressed, or to deliver a certificate or make proof of the truth of such his or their receiving the said sacrament in manner aforesaid, or as impose upon any such person or persons any penalty, forfeiture, incapacity, or disability whatsoever, for or by reason of any neglect or omission to take or receive the sacrament within the respective periods and in the manner in the said acts respectively provided in that behalf, shall, from and immediately after the passing of this act, be, and the same are hereby repealed."

§ 1, repealing the acts requiring the sacrament to be taken as a qualification for offices.

And by § 2, reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, and the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, are by the laws of this realm severally established, permanently and inviolably, and that it is just and fitting that on the repeal of such parts of the said acts as impose the necessity of taking the sacrament of the Lord's Supper according to the rites or usage of the Church of England, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof, it is enacted, "That every person who shall hereafter be placed, elected, or chosen, in or to the office of mayor, alderman, recorder, bailiff, town clerk or common councilman, or in or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough or cinque port within England and Wales, or the town of Berwick upon Tweed, shall, within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:—

"I, A B, do solemnly and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office of ——— to injure or weaken the Protestant church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be by law entitled."

And by § 3, it is enacted, "That the said declaration shall be made and subscribed as aforesaid, in the presence of such person or persons respectively, who, by the charters or usages of the said respective cities, corporations, boroughs, and cinque ports, ought to administer the oath for due execution of the said offices or places respectively, and in default of such, in the presence of two justices of the peace of the said cities, corporations, boroughs, and cinque ports, if such there be, or otherwise in the presence of two justices of the peace for the respective counties, ridings, divisions, or franchises, wherein the said cities, corporations, boroughs, and cinque ports are; which said declaration shall either be entered in a book, roll, or other record to be

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kept for that purpose, or shall be filed amongst the records of the city, corporation, borough or cinque port."

And by § 4, it is enacted, "That if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed."

And by § 5, it is enacted that every person who shall be admitted into any office or employment, or who shall accept from his majesty any patent, grant, or commission, and who by his admittance into such office, &c., or by acceptance of such patent, &c., would before the act have been required to take the sacrament, shall within six calendar months after his admission to such office, &c., or his acceptance of such patent, &c., make and subscribe the aforesaid declaration, or in default thereof his appointment, &c., shall be void.

By § 6, the aforesaid declaration shall be made and subscribed in the Court of Chancery or the Court of King's Bench, or at the quarter sessions of the county or place where the person shall reside, and shall be preserved among the records of the court.

By § 7, it is provided that no naval officer below a rear admiral, and no military officer below a major-general in the army or colonel of militia, shall be required to make the declaration in respect of his commission, and that no commissioner of customs, excise, stamps, or taxes, or any person holding any office in the collection, &c., of the revenues subject to the said commissioners, or any officer concerned in the collection, &c., of the revenues subject to the postmaster-general, shall be required to make the said declaration; and provided that no naval or military officer or other person as aforesaid upon whom any office, place, &c., shall be conferred during his absence from England, or within three months previous to his departure from thence, shall be required to make the said declaration until after his return, or within six months thereafter.

By § 8, it is enacted that all persons now in the actual possession of any office, command, &c., or in receipt of any pay, &c., in respect of which they ought to have heretofore taken, or to take the sacrament, shall be confirmed in their offices, &c., notwithstanding their omission to take the sacrament in manner aforesaid, and shall be indemnified against all disabilities, penalties, &c., incurred in consequence of such omission; and that no election or act to be done by any such person or under his authority, and not yet avoided, shall be hereafter questioned or avoided by reason of any such omission, but that every such election and act shall be as valid as if such person had duly received the sacrament.

And by § 9, it is provided that no act done in the execution of any of the corporate or other offices, &c., aforesaid, by any person omitting as aforesaid, shall by reason thereof be void or voidable as to the rights of any other person not privy to such omission or neglect, or render such last-mentioned person liable to any action or indictment.||

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THE taking or giving of a reward for offices of a public nature is said to be bribery. And surely, says Hawkins, nothing can be more palpably pre-

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judicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation, but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations.

3 Inst. 184; Hawk. P. C. c. 67. It is said to be *makum in se* and indictable at common law. Noy, 102; Moor, 781.

For which reasons, among many others, it is expressly enacted by 12 Ric. 2, c. 2, "That the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, sheriff escheators, customers, comptrollers, or any other office or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers for any gift or brokerage, favour or affection; nor that none that sueth by himself, or by others, privily or openly, to be in any manner of office, shall be put in the same office, or in any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient, to their estimation and knowledge."

For the exposition hereof, vide the Earl of Macclesfield's trial, [State Trials, vol. 6, 447.]

And by the 4 Hen. 4, c. 5, it is enacted, "That no sheriff shall let his bailiwick to farm to any man for the time that he occupieth such office."

¶ And by stat. 1 W. & M. c. 21, § 8, it is enacted, that it shall not be lawful for any *custos rotulorum*, or other person to whom it belongs to appoint a clerk of the peace, to sell that office; but that every *custos rotulorum* who shall sell the clerkship of the peace, and every clerk of the peace who shall buy his place, are disabled to hold their respective places, and shall forfeit double the sum given and taken for the same. The 10th section of the act provides, that it shall not extend to the clerkship of the peace for Lancashire.¶

But the principal statute relating to this matter is the 5 & 6 E. 6, c. 16, which is *verbatim* as follows, § 1, "For avoiding of corruption which may hereafter happen to be in the officers and ministers in those courts, places, or rooms, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, or any service of trust executed, shall hereafter be preferred to the same and no other."

¶ Vide 49 G. 3, c. 146, *post*.¶

§ 2. "Be it therefore enacted, That if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any

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promise, agreement, covenant, bond or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputation of any office or offices, or any part of any of them; or to the intent that any person should have, exercise, or enjoy any office or offices or the deputation of any office or offices, or any part of any of them, which office or offices, or any part or parcel of them, shall in anywise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the king's highness' treasure money, rent, revenue, account, aulneage, auditorship, or surveying of any of the king's majesty's honours, castles, manors, lands, tenements, woods, or hereditaments, or any the king's majesty's customs, or any administration or necessary attendance to be had; done, or executed in any of the king's majesty's custom-house or houses, or the keeping of any of the king's majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of court of record wherein justice is to be ministered; that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward, or profit, for any of the said office or offices, deputation or deputations, of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit, to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest, and estate, which such person or persons shall then have of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any the said office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, bond, or assurance to have or receive any reward, money, or profit; but also that all and every such person or persons that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond, or assurance for any of the said offices, or for the deputation or deputations of any the said office or offices, or any part of any of them, shall immediately, by and upon the same fee, money, or reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money, or reward, to be paid as is aforesaid, be adjudged a disabled person in the law to all intents and purposes to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance to give or pay any sum of money, fee, or reward."

§ 3. "It is further enacted, That all and every such bargains, sales, promises, bonds, agreements, covenants, and assurances, as be before specified, shall be void to and against him and them by whom any such bargain, sale, bond, promise, covenant, or assurance shall be had or made."

§ 4. "Provided always, that this act, or any thing therein contained, shall not in anywise extend to any office or offices whereof any person or persons is, are, or shall be seised of any estate of inheritance; nor to any office of parkership, or of the keeping of any park-house, manor, garden,

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chase, or forest, or to any of them; any thing in this act heretofore mentioned to the contrary thereof in anywise notwithstanding."

§ 5. "Provided also, that if any person or persons do hereafter offend in any thing contrary to the tenor and effect of this act, yet that notwithstanding, all judgments given, and all other act or acts, executed or done, by any such person or persons so offending by authority or colour of the office or deputation, which ought to be forfeited, or not occupied, or not enjoyed, by the person so offending, as is aforesaid, after the said offence so by such person so committed or done, and before such person so offending for the same offence be removed from the exercise, administration, and occupation of the said office or deputation, shall be and remain good and sufficient in law to all intents, constructions, and purposes, in such like manner and form as the same should or ought to have remained and been, if this act had never been had or made.

"Provided also, that this act shall not extend to be prejudicial or hurtful to any of the chief justices of the king's courts, commonly called the King's Bench or Common Pleas, or to any of the justices of assize that now be, or hereafter shall be; but that they and every of them may do in every behalf, touching or concerning any office or offices to be given or granted by them or any of them, as they or any of them might have done before the making of this act; any thing above mentioned to the contrary in anywise notwithstanding."

In the construction of the last-mentioned statute, the following opinions have been holden:

1. That the offices of chancellor, registrar, and commissary in ecclesiastical courts are within the meaning of the statute, inasmuch as those courts do not only determine matters which are brought before them *pro salute animæ*, but also have the decision of disputes concerning the lawfulness of matrimony, and legitimation of children, which touch the inheritance of the subject; and also hold plea of legacies and tithes, &c., in which respects they are courts of justice.

Cro. Ja. 269; 3 Inst. 148, pl. 12; Co. 78; Salk. 468, pl. 6; 3 Lev. 289; 2 Vent. 187, 267.

||Therefore a bond given by a person appointed to the office of registrar of an archdeacon's court, conditioned to permit the archdeacon to receive the profits, and also to surrender the office when the archdeacon requires, is void within the third section of the statute.

Layng v. Paine, Willes R. 571. But the office of clerk to the deputy registrar of the prerogative court of Canterbury is not within the act. *Aston v. Gwinnell*, 3 Younge & J. 136. || A When the bond of indemnity given by a deputy is an integral part of the contract of sale of the office, it may be void. But where it is executed after the contract is past, and the deputy constituted, being no part of the vicious contract, it is as valid as if there had been no sale of the deputation. *Baldwin v. Bridges*, 2 J. J. Marsh. 10. But a bond given by a deputy sheriff to secure the principal against any injury that might accrue by the act of his deputy, where there was a sale of the office, is void. *Love v. Buckner*, 4 Bibb, 506; 1 Lit. R. 10; *Lewis v. Knox*, 2 Bibb, 453. See *Tappan v. Brown*, 9 Wend. 175.

2. It hath been adjudged, that offices in fee are out of the statute: so, if the king be seised in fee of a bailiwick, and he demise the same to A who demises to B, rendering rent, the demise to B is not within the statute: for offices in fee being excepted out of the statute, under-leases of such offices are also excepted inclusively.

2 Lev. 151, *Ellis v. Ruddle*.

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3. It hath been resolved, that the place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same; and that the king is bound by this statute.

7 Bulst. 91, Sir Arthur Ingram's case; Co. Lit. 234, S. C., and there said, that the king could not dispense with the statute by any *non obstante*. Cro. Ja. 385, S. C. cited.

4. It hath been agreed that the sale of a bailiwick of a hundred is not within the statute, for such an office doth not concern the administration of justice, nor is it an office of trust.

4 Leon. 33, Godbolt's case; 4 Mod. 223, S. C. cited.

5. If A being surveyor of the customs agrees with B that B shall be his deputy, and that in consideration thereof B shall pay A 600*l.* and 100*l.* annually, and it is further agreed, that A will surrender his patent, and procure a new one in the name of A and B, which is done accordingly, and B gives A a bond for performance of the whole agreement, the bond is void, as being within this statute; for though part of the condition, such as procuring a new patent, &c., may not be void within the statute, yet being joined with that which is so, it makes the whole void.

2 And. 55, 107, Smith v. Cotleshill.

6. It hath been adjudged, that a seat in the six-clerk's office is not within the statute, being a ministerial office only; and they are but under-clerks, who have so much a sheet for copying, &c. But one judge held it not saleable at common law, for the following reasons: 1st. Discouragement of merit and industry. 2dly, Its being the occasion of extortion and exaction of excessive fees. 3dly. From its being a great charge to suits. 4thly. It exempts the persons, who enter by these means, in a great measure from the due regulations under which they ought to be; for they are not so easily removed, as if they were at the will of him who hath the disposal of them.

Paach. 26, Car. 2, in C. B. Sparrow v. Reynold.

||7. It hath been decided, that the office of Warden of the Fleet is within the statute, as being an office concerning the execution of justice, and therefore an agreement with the grantee *for life* of the office, that the grantee should for a sum of money surrender the office to the king, for the intent to procure a grant of it from the king to the defendant, was held void within the statute, and a bond given for payment of the consideration-money could not be enforced in a court of law. In this case it was contended that the office came within the exception in the fourth section, the inheritance of it being in the crown, and the case of (a) Ellis v. Ruddle, 2 Lev. 151, (ante, p. 299,) was relied on as showing that the exception extended to offices whereof the fee was in the crown, as well as to those where it was vested in a subject. That case was respecting a demise for years, at a rent of the office of Bailiff of the Savoy; which appears to have been held not an office within the statute, inasmuch as the inheritance was in the crown. But Willes, C. J., after remarking on the imperfect manner in which the case is reported, both in Levinz and Keble, observes in explanation of the decision, (which he considered otherwise absurd,) that the bailiwick of the Savoy was in the king as Duke of Lancaster, and was therefore probably considered as on the same foot as if the office were the inheritance of a subject. And, if so, the case of Ellis v. Ruddle was no authority in the principal case. If the court did not go upon this, the construction was absurd, and would almost overturn the whole act; for as to most of the offices there enumerated,



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and many others, the inheritance was undoubtedly in the king. The exception, therefore, only meant where the inheritance was in a *subject*.

*Huggins v. Bambridge*, Willes's Rep. 241; 2 G. 2, c. 32. (a) Reported under name of *Ellis v. Audle*, 3 Keb. 552, of *Ellis v. Nulso*; *Ibid*. 659, 678.

8. It hath been holden, that an assignment of all the income and emoluments of the office of clerk of the peace for the city and liberty of Westminster is invalid, even although the assignment is expressly subject to the deduction of the salary or allowance of the deputy.

*Palmer v. Bate*, 2 Brod. & B. 673; 6 Moo. 28.

But an assignment of all the profits of the office of private secretary to Lord Holdernesse, was held valid.

*Harrington v. Klopogge*, *Ibid*. 678, n.; 2 Chitt. R. 475. β When a person receives a deputation to a public office, and is by law entitled to a certain per centage upon the fees and emoluments of the office of his principal, and on receiving his appointment agrees to perform the duties of his office at a fixed salary, such agreement, being in violation of the act against buying and selling offices, is void, although it be not certain that the stipulated sum would be less than the per centage allowed by law. *Tappan v. Brown*, 9 Wend. 175.

9. It hath been held, that this statute doth not extend to military officers; (a) and that the 7 W. & M. which requires that every commission officer, before his commission is registered, should take the oath there mentioned, that he had not, directly or indirectly, given any thing for procuring the commission but the usual fees, extends only to horse, foot, and dragoons, but not to the marines.

*Ive v. Ash*, Prec. Chan. 199; [and vide 49 G. 3, c. 126, § 7, 8.] [(a) 1 Vern. 98. Nor to the purser of a ship. 2 Vern. 308, Ca. temp. Talb. 140. But see 1 H. Bl. 326, where it is said by Lord Loughborough, C. J., that this case in 2 Vern. is contrary to an evident principle of law. And clearly, if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted. *Purdy v. Stacey*, 5 Burr. 2698.]

10. It hath been adjudged, that the sale of the deputation of the office of Provost-Marshal of Jamaica, is not within this statute; (b) because this statute does not extend to the plantations.

4 Mod. 222; 2 Salk. 411, *Blankark v. Galdy*; 2 Ld. Raym. 1245, S. C. cited. (b) 2 Mod. 45, S. P. undetermined, and there said *arguendo*, that so good a law should have as extensive a construction as possible. [But the 49 G. 3, c. 126, extends the act to the plantations. See 9 Barn. & C. 462.] β Contracts relating to the disposition of an officer, although not within the provision of the statute, are deemed by the English and American courts as illegal and void. *Outon v. Rodes*, 3 Marsh. 432.

11. In a writ of error on a judgment in Ireland, it was held clearly, that the office of clerk of the crown, and clerk of the peace, was within the statute; but that this law did not extend to Ireland, not being enacted there. [But it is now extended to Ireland, vide 49 Geo. 3, c. 126, s. 1.

*Trin*. 9 G. 2, in B. R., *Maccarty v. Wickford*.]

12. It hath been held, that one who makes a contract for an office contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatsoever.

*Hob*. 75; *Co. Lit*. 234; *Cro. Car*. 361; *Cro. Ja*. 386; *Ca. temp. Talb*. 107.

13. It is held, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a less sum out of the salary, it is good; so if the profits be uncertain arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits

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of the office, it is good: for in these cases the deputy is not to pay, unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute.

2 Salk. 468; 6 Mod. 234; *Godolphin v. Tudor*, Comb. 356, S. P., [more fully reported in Durnford's Willes's R. 575, note (f).]

[14. It hath been adjudged, that a trust may be created of an office clearly within this statute. But subsequent determinations (a) have made this doctrine exceedingly questionable, if not entirely overruled it.

*Bellamy v. Burrow*, Ca. temp. Talb. 97. (a) *Fordyce v. Willis*, 3 Bro. Ch. Rep. 479; *Parsons v. Thompson*, 1 H. Bl. 322; *Garforth v. Fearn*, *ibid.* 327. These two last cases have determined, that if an action for money had and received be brought upon the foot of an agreement, to allow the plaintiff a certain proportion of the profits of the office, in consideration of his having procured, or been aiding to the defendant's appointment to it, the plaintiff cannot recover;] [and see *Card v. Hope*, 2 Barn. & C. 661; *Ureville v. Atkins*, 9 Barn. & C. 462.]

15. It hath been holden, that this being a public law the judges *ex officio* are to take notice of it; yet it seems the more regular and safe way to plead it. (b) But it hath been resolved, that a person in pleading this statute need not allege, that the party against whom it is pleaded is not within any of the provisos or exceptions in the statute; but that if he be, it must come on his side to show it.

*Trin. 9 G. 2*, in *B. R. Maccarty v. Wickford*. (b) *Hornby v. Comford*, *Fitz.* 45. [See 2 Maul. & S. 539; 1 Term. R. 645, 646, *acc.*]

[As the provisions of this statute do not extend to all cases within the mischief which it was intended to prevent, it has become necessary for courts of equity, in many cases, to interpose; for though it be true, that penal laws are not to be extended as to penalties and punishments, yet, if there be a public mischief, and a court of equity see private contracts made to elude laws enacted for the public good, it ought to interpose, and that, upon the public policy of the law, though the office be not within the statute of E. 6. For it is a rule of equity, "that if a man sells his interest, to procure a person an office of trust or service under the government, it is a contract of turpitude; it is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the crown for their abilities and with purity."

The defendant, who was a linen draper, entered into a treaty with the plaintiff, who was a livery servant, to procure him a commission in the marines for 200*l.*, which the defendant effected by means of a lady, who was intimately connected with one of the lords of the Admiralty, and afterwards received the money. The plaintiff, after six months, being discovered to have worn a livery, was discharged, upon which he filed a bill to be repaid the sum he had advanced to the defendant. Lord Henley decreed the money to be repaid with interest; for though commissions in the army may be sold, yet that is with leave of the crown, and the person to succeed is examined by the Secretary at War, and approved as a proper person: that that was not the case here; but the defendant sold his interest with the lady to procure a commission. The case of *Ive v. Ash*, he said, was very differ-

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ent; the commission was sold by leave of the crown, the defendant surrendered, and it was the plaintiff's fault that he did not take it.

*Morris v. McCulloch*, Amb. 432.

The offices of collector and supervisor of the excise are clearly within the statute, and though a bond given to a person to influence a commissioner to appoint one to either of those offices, be not directly a sale within the statute, yet in effect it is so, and equity will therefore relieve against it.

*Law v. Law*, Ca. temp. Talb. 140; 3 P. Wms. 391, S. C.

The late Lord Rochford being groom of the stole to his majesty, and, in consequence of that office, recommending pages of the presence, &c., treated with the plaintiff's testator, to recommend him upon a vacancy, on condition that he should grant two annuities, one of 100*l.* to St. Ferrol, the defendant's testator, who had been Lord Rochford's travelling tutor, and was then a bond creditor of his lordship for 600*l.*, and the other of 40*l.* to another person. An action being brought upon the annuity bonds by defendant's testator for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been overruled, and upon the motion to continue the injunction upon the merits, the answer being put in; it was argued on the part of the plaintiffs, that this bond was *pro turpi causa*; that Lord Rochford having a confidence placed in him by the king, had abused that confidence, by selling his recommendation, and that upon the public policy of the law, such an agreement ought not to stand. On the other hand, it was argued, that it was allowed this was not an office within the statute of E. 6; that it was merely an office respecting the king's private, not his public character; and that if it was *turpis contractus*, that might have been pleaded at law. Lord Thurlow expressed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action, but thought that not a sufficient reason to prevent his interposition, the court of law never having determined that it could be so brought there as a defence. He then, admitting that it was not within the statute of E. 6, but treating it as a matter of public policy of the law, and similar to marriage-brokerage bonds, where, though the parties are private persons, the practice is publicly detrimental, ordered the injunction to be continued till the hearing; and afterwards, upon the hearing, ordered it to be perpetual.

*Haneington v. Du-Chatel*, 1 Bro. Ch. Rep. 124. That the illegality of the consideration can be pleaded to an action on a bond is denied by the court in *Andrews v. Eaton*, Fitzg. 73; but see *Collins v. Blantern*, 2 Wils. 341.] || *Paxton v. Popham*, 9 East, 408; *Greville v. Atkins*, 9 Barn. & C. 462, which settle that the illegality may be shown by plea.]

|| So also, it has been decided that the appointment of captain of an East Indiaman, although not within the statute, cannot be legally sold by the owner without the consent of the East India Company. Such a sale was held contrary to a by-law of the company, and a fraud on the company, and contrary to principles of public policy.

*Blachford v. Preston*, 8 Term R. 89; and see *Card v. Hope*, 2 Barn. & C. 661; *Richardson v. Mellish*, 2 Bing. 229.

The provisions of the statute of 5 & 6 Edw. 6, c. 16, have been very materially enlarged and extended by the 49 Geo. 3, c. 126, intituled *An act for the further prevention of the sale and brokerage of offices*. The 1st section, after reciting at length the act of Edw. 6, declares, and enacts, that the said act and all its provisions shall extend to Scotland and Ireland, and

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to all offices in the gift of the crown, or of any office appointed by the crown, and all commissions, civil, naval, or military; and to all places and employments, and all deputations to any such offices, commissions, places, or employments in the departments, or under control of the treasury, the secretary of state, the commissioners of the office of lord high admiral, the master-general and officers of ordnance, the commander in chief, secretary at war, paymaster-general, commissioners for affairs of India, and of excise, treasurer, and commissioners of navy, commissioners of victualling and transports, the commissary and storekeeper-general, and, also, the principal officers of any other public department in any part of the United Kingdom and colonies, and also to all offices, commissions, and employments, under the East India Company.

Section 2 enacts, that where the right of any person shall be forfeited under the former act or this act, the right of such appointment shall immediately vest in his majesty.

Section 3 renders it a misdemeanor either to buy or sell, or to receive, or give any money, reward, or profit, or any promise, agreement, bond, or assurance, directly or indirectly, for any office, commission, place, or employment specified in or within the meaning of the former or the present act, or for any deputation thereto, or any participation of the profits thereof, or for any appointment thereto, or resignation thereof, or for the consent, or voice of any person to any such appointment or resignation.

Section 4 renders it a misdemeanor in any person, either to receive or give any money, reward, or profit, or any promise, agreement, bond, or assurance, directly or indirectly, for any interest, solicitation, or recommendation in any way, touching any nomination or appointment to any such office, place or employment as aforesaid, or for any person in expectation of money, reward, or profit, to solicit, recommend, or negotiate for any person touching any such nomination or appointment.

It appears to have been a misdemeanor at common law to offer a bribe for procuring an appointment to a public office. *Rex v. Vaughan*, 4 Burr. 2494; *Rex v. Pollman*, 2 Camp. 230.

Section 5 renders it a misdemeanor to open any house or office for soliciting, transacting, or negotiating any business relating to the sale or purchase, resignation or exchange, of any office or employment under any public department.

Section 6 imposes a penalty of 50*l.*, (a) on any person advertising or publishing any such house or office, or the names of any brokers, agents, or solicitors, or any advertisements or proposals for any of the purposes aforesaid, the whole of the penalty to go to the person suing.

(a) See *Clark v. Harvey*, 1 Stark. Ca. 92.

Section 7 provides that the act shall not extend to any commissions and appointments in the band of Gentlemen Pensioners, the Yeoman Guard, (b) the Marshalsea and Palace Court, nor to purchases and exchanges of commissions in his majesty's forces at the regulation prices.

(b) Nor to His Majesty's Battle Axe Guards in Ireland, 53 G. 3, c. 54.

Section 8 provides that any officer in his majesty's forces receiving or paying more than the regulation price for any commission, or paying any sum in any agent for negotiating the purchase, sale, or exchange of any commission, shall forfeit his commission and be cashiered, and his commission shall be sold, and half the regulated value (not exceeding 500*l.*) be paid to the

(G) What Remedies must be pursued, &c.

informer, and the remainder applied as his majesty shall direct; and if any officer retiring from the service shall receive for his commission more than the regulation price, he and his aiders and abettors shall be guilty of a misdemeanor.

Sections 9, 10, & 11, provide that the act shall not extend to an office excepted from the act of Edw. 6, or to any office legally saleable before the passing of this act, or to invalidate any agreement, bond, &c., which, before the passing of this act, was valid; or to prevent or make void any deputation to any office in any case in which it is lawful to appoint a deputy, or any agreement, bond, &c., in respect of any allowance or salary out of the fees of such office: nor to any annual reservation or payment out of the fees of any office to any person having held such office, provided that the amount of such reservation, and the circumstances under which the same shall have been permitted, shall be stated in the commission or appointment of the person succeeding to such office, and paying such money.

Section 12 enacts that the present masters, six clerks,<sup>(a)</sup> and first and second examiners of the Court of Chancery in Ireland, may proceed touching the disposition and appointment of their offices in such manner as has been accustomed; but that after their death, resignation, or removal, the provisions of the statute of Edw. 6, and of this act, shall be applicable to their offices.

(a) But 53 G. 3, c. 129, provides that 49 G. 3, c. 126, shall not extend to the six clerks' offices in Ireland; so, that this clause seems in effect repealed, except as to the masters and examiners in Chancery.

(Vide also sections 13, 14 and 15.)

A bond was given by A B to C D, colonial secretary of Tobago, reciting, that C D had appointed A B his deputy, and to receive the fees of office in consideration of his paying him 450*l.* *per annum* thereout, and the condition was for punctual payment of that sum without saying "out of the fees." To an action on the bond, A B pleaded that the bond was given in pursuance of a corrupt agreement against the statute, that A B should pay the 450*l.* *per annum*, at all events, to C D. Issue was taken on this plea, and found for A B. The court held, that the fact found showed the bond to be illegal and void by the 49 Geo. 3, c. 126, and also that the plea, showing the illegal agreement, was good.

Greville v. Atkins, 9 Barn. & C. 562; and see Godolphin v. Tudor, 2 Salk. 468; 1 Bro. P. C. 135.

(G) What remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.

It was held clearly, that an assize lay at common law for an office, and that therefore though the statute of West. 2, 13 Ed. 1, stat. 1, c. 25, speaks only of offices in fee, yet an assize lies for an office in tail or for life. But this is to be understood of offices of profit, for of an office of charge and no profit an assize does not lie.

8 Co. 47 a; John Webb's case, 2 Inst. 412, S. P.

But a man shall not have an assize of the whole office, unless he be disseised of the whole; for if a man be disseised of parcel of the profits of an office he may have an assize of that parcel only.

8 Co. 49 b; 2 Inst. 412.

In an assize for an office newly erected and constituted, the demandant in his plaint must show what fee or profit is granted for the exercise thereof;  
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## (G) What Remedies must be pursued, &amp;c.

for this office cannot have a fee or profit appurtenant to it, as an ancient office may, and for an office without fee or profit no assize lies.

8 Co. 49, Webb's case.

But in an assize for an ancient office, the demandant in his plaint need not show what fee or profit is belonging to it, for it shall be intended there is some fee or profit.

8 Co. 49.

In an assize for an office the demandant must show a seisin; but it hath been held, that the taking of 3*d.* for a *capias* against B, is a sufficient seisin of the office of filazer *de banco*.

Roll. Abr. 270.

So if one be committed by the House of Commons to A, who before and long after was in possession of the office of *serjeant-at-arms* to the House, and the prisoner compound with B for his fees, and gave him twenty shillings; this is a good seisin of the office by B, for he cannot be disseised thereof, but at his election. It was likewise held, that proving that B being in the *lobby* of the House of Commons, took hold of the door of the house, and laid his hand upon the mace, then being in the hands of A to take it, but hindered by A, was good evidence both of a *seisin* and *disseisin*.

2 Lev. 108, Cragg v. Norfolk, adjudged.

But where the serjeant of the mace to the House of Commons, in an action upon the case for a disturbance, recovered damages; whether this was a sufficient seisin, the damages being recovered in satisfaction of the fees, and he then being out of possession of his office, was doubted; some of the judges inclining one way and some the other; and it was intended to have been found specially, but the plaintiff being unwilling to stand to it was nonsuit.

Lev. 108; and vide Mod. 192, where such recovery is held to be a sufficient seisin.

Also, in an assize for an office, the demandant in his plaint must set forth a title.

3 Mod. 273, Savier v. Lenthol; by which book it appears, that the demandant not being ready to set forth a title, the assize was adjourned till the next day, when he appeared and set forth a title, and process was prayed against the defendant.—But by Salk. 82, S. C., the demandant was nonsuited the second day for not counting; and the court told him, he might bring a new assize. Comb. 173, S. C., and the plaintiff nonsuited; and vide Dyer, 114, pl. 63, 149, pl. 81, 152, pl. 9; 8 Co. 45 b.

An assize lies for the office of registrar of the (a) Admiralty; for though their proceedings are according to the civil law, yet the (b) right of their offices is determinable at common law. So of the mastership of an hospital, being a lay fee.

8 Co. 47; 2 Inst. 412; 11 Co. 99 b; Dyer, 152. (a) So, the right of the office of registrar to a bishop is to be determined at common law, and not to be tried in the spiritual court, though the subject-matter is spiritual; because the office itself being matter of freehold, is for that reason of temporal cognisance.—For this vide Roll. Abr. 285; 4 Mod. 27, 28; Carth. 169. (b) So, chancellors, registrars, proctors, &c., being officers of temporal profit, are to sue for their fees in the temporal courts.—For this vide tit. *Fees*, letter (D).

A man may bring an action on the case (c) for the profits of an office, though he never had seisin.

Mod. 192, per Hale, C. J. [But if the perquisites of an office are mere gratuities, not known and accustomed fees, neither an assize, nor an action for money had and received, will lie to recover them. Boyter v. Dodsworth, 6 Term R. 681.] (c) An action on the case for disturbing a person in the exercise of the office of parish clerk.

## (H) Of the Nature of Offices as to their Duration, &amp;c.

2 Salk. 468, pl. 7. But not so advisable as an assize; because a jury may not well compute the damages in proportion to the loss of a man's livelihood. Carth. 169.

If the king grant the office of comptroller of the customs to A and B *durante beneplacito*, and A die, and afterwards the king grant the said office to C, and yet B, under pretence of survivorship, exercise the said office, and receive the profits thereof, C may have an *indebitatus assumpsit* for so much money had and received to his use.

2 Mod. 160, adjudged, upon a special verdict between Arris v. Stukely, 2 Jon. 126; 2 Lev. 245, S. P., between Hayward v. Wood; where the defendant, under pretence of title, received the fees belonging to the plaintiff as steward of a court-baron. ¶ Where there are no fees, an information in nature of *quo warranto* is the only convenient mode of trying the right to the office. 2 East, R. 312.]

[The head of a college hath not such an estate in his office as will entitle him to maintain an assize for it, for he hath no sole seisin.

*Per* Holt, C. J., in Phillips v. Bury, 2 Term R. 335.]

## (H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will, and Reversion.

OFFICES, in respect to their duration and continuance, are distinguished into those which are of inheritance, or in fee, or fee-tail, those of freehold or for life, those for years or a limited time, and those which are at will only. And here we must again observe, that though all offices, in relation to the administration of justice, are originally and inherently lodged in the crown, yet cannot the king himself grant these in any other manner than warranted by ancient usage, or so as to be injurious or inconvenient to the public.

9 Co. 97.

But, where no inconvenience can ensue to the public, there, offices are allowed to descend as inheritances; as, the offices of (a) Earl-Marshal of England; so, of park-keeper, forester, jailer, (b) sheriff, &c.

Dyer, 285; 7 Co. 33; Plow. 2; 2 Inst. 382; 2 Roll. Abr. 153. (a) So the office of Seneschal of England formerly belonged to the earldom of Leicester, and came afterwards to the Staffords, and Dukes of Buckingham, and the last who had it in fee was Edward, Duke of Buckingham, who was attainted 13 H. 8; but now it is never granted to any subject only *pro hac vice*. 4 Inst. 58, 127; 7 Mod. 125, cited. (b) The mayor and citizens of London have the shrievalty of London in fee, and the sheriffs of London are guardians under them, and removable from year to year. 2 Inst. 382.

And if one hath the office of park-keeper, forester, jailer, sheriff, &c., to him and his heirs, he may grant these offices to one for life, remainder to another for life, &c., for *omne majus continet in se minus*; and as they are grantable over in fee, so may they be granted in succession to one for life, with remainders over.

Plow. 379 b, 331 a; 9 Co. 48, 97.

So offices may be entailed; as the office of Earl-Marshal of England, or the office of steward, bailiff, or receiver of a manor, may be entailed; because they are demandable in a *præcipe ut tenementa*, and, being exercisable within the manor, are therefore looked upon as members or branches of it.

7 Co. 33; Co. Lit. 20 a; Roll. Abr. 838.

So a woman may be endowed of an office; as of the office of the Marshalsea, to have the third part of the profits, and in such case she shall be contributory to a third part of the charge. So, she may be endowed *de tertid parte exituum provenient. de custodia gaolæ abbathie Westm.*, or of the third part of the profits of courts, fines, heriots, &c.

*Perk.* § 342; Co. Lit. 32; Roll. Abr. 676; Plow. 379 b; F. N. B. 149.

## (H) Of the Nature of Offices as to their Duration, &amp;c.

It is said, that, at common law, all officers of justice had estates in their respective offices during life, and could not be removed but for misdemeanors: so, was the office of clerk of the crown in B. R. and in Chancery: so are the clerks in the Exchequer, and the filazers in C. B.(a) And in this respect the wisdom and policy of the law was very great; because, when men held their offices for life, it was an encouragement to the faithful execution of their duties; it was then, also, they endeavoured to acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not liable to be displaced at the pleasure of those who put them in.

4 Mod. 167; Show. 428, said *arguendo*. [(a) Previous to the Middlesex Ca. 1804, 2 Peckwell's Ca. 89, the owners of all offices, having a freehold interest in their office, were admitted to vote for members of the counties where their offices were situate, if the value was sufficient: in that case, however, all such officers were held not entitled to vote, unless their profits were derived from land; and the votes of Masters in Chancery, and other life officers, *ejusdem generis*, were held bad. See Dodd's Doubtful Questions in Election Law, ch. 4.]

If an office be granted to a man to have and enjoy so long as he shall behave himself well in it, the grantee hath an estate of freehold in the office; for since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life; since it must be his own act (which the law does not presume to foresee) which only can make his estate of shorter continuance than his life. So if the office be granted to a man *quamdiu se bene gesserit tantum*, his estate will not be less for the word *tantum*; for the grant is of equal extent with the former, and his misbehaviour in each case determines his interest.

Co. Lit. 42; Roll. Abr. 844; Show. Parl. Cases, 161. [The king by letters patent may suspend a public officer, though the office be for life. Slingsby's Ca., from Lord Nottingham's MSS.; 3 Swanst. 178.]

Therefore, where by the statutes(b) directing in what manner the *custos rotulorum* shall be appointed, &c., it is among other things provided, that the *custos* shall appoint and nominate the clerk of the peace, when void, who may execute it by himself or deputy, for so long time only as he shall demean himself well; in the construction of these words it was held, that the clerk had an office for life, and that it did not determine with the *custos*.

4 Mod. 167; Show. 426 to 536; Harcourt v. Fox, Show. Parl. Cases, 158; S. C. 1.d. Raym. 161; S. C. Comb. 209; 12 Mod. 42, S. C. [(b) By stat. 37 H. 8, c. 1, § 3, the *custos rotulorum* is authorized to appoint a fit and able person to hold the office of clerk of the peace, during the time that the said *custos rotulorum* shall occupy the said office of *custos*, so as the said clerk of the peace demean himself justly and honestly. By stat. 1 W. & M. c. 21, the *custos* is authorized to nominate a clerk of the peace, for so long a time only as such clerk of the peace shall well demean himself in his said office; and if he do not well demean himself in his office, the sessions of the county, on application and proof made as the act requires, may remove him.]

The judges of the several courts at Westminster held formerly their places *durante bene placito*, but now by the 12 & 13 W. 3, their commissions are *quamdiu se bene gesserint*, by which they hold their offices for life; but upon the address of both Houses of Parliament it may be lawful to remove them.

4 Inst. 74, 117.

It hath been determined, that at common law the patents of the judges,(c) sheriffs, escheators, commissioners of oyer and terminer, jail-delivery, and of the peace, and of the attorney and solicitor-general, are determined by the death of the king, in whose name they are made.

And. 44; Dyer, 165; Cro. Car. 1, 2; N. Bendl. 79. (c) But the office of sheriff in



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such places where he is chosen by a corporation, having by its charter the inheritance of the office, does not determine by the demise of the king. 7 Co. 30 b.—Nor the authority of a coroner or verderer. *Dalis*. 15; *Dyer*, 165; 2 *Inst.* 175; *Lev.* 120.—Nor does any corporation officer, who by the charter is invested with judicial authority, lose it by such demise. 2 *Hawk. P. C.* 3; and vide the statutes 7 & 8 W. 3, c. 27, and 1 Ann. c. 1, for continuing all patent officers for six months after such demise, tit. *Courts*, letter (C).—[And by stat. 1 G. 3, c. 23, the offices of the judges do not become vacant on the demise of the crown.]

It hath been adjudged in Sir George Reynold's case, that the office of the King's Bench prison (a) could not be granted for years, for that being an office of great trust concerning the administration of justice, in keeping of prisoners till they pay their debts, if it should be granted for years, might be injurious to the public, in that it would go to the executors or administrators, or might be in suspense till probate of the will or administration taken out; and if the officer should die indebted, so that none would prove his will, or take out administration, then there would be no officer at all, and executors or administrators would be in by act of law, without allowance of the court. Also, it might be a question, if such office should not be forfeited by outlawry, or be assets in the executor's hands; and many other inconveniences would follow if such grant for years were allowed. For the same reasons it was held likewise, that the offices of *custos brevium*, chirographer, clerk of the pipe of the king's silver, or of the crown, remembrancer, or chamberlain of the Exchequer, prothonotaries, and other officers in the several courts of justice, could not be granted for years.

9 Co. 27; *Roll. Abr.* 847; 2 *Roll. Abr.* 153; *Cro. Car.* 587; *Johns.* 563; *Hob.* 153; 3 *Mod.* 145. (a) The power of appointing the Marshal of the King's Bench prison, reverted in the crown, by 27 G. 2, c. 17, which vide.

But such offices as do not concern the administration of justice, but only require skill and diligence, may be granted for years, because they may be executed by deputy, without any inconvenience to the public; therefore, where a grant for years was made of the office of garbler of spices in London, it was adjudged to be a good grant, or at least a good appointment for years, within the intent of the statute of 1 Jac. 1, c. 19.

*Hard.* 46, 353, *Jones v. Clerk*.

The office of registrar of policies of assurance in London, concerning merchants, was granted by the king for years, and adjudged to be a good grant, because it did not concern the administration of justice in any court, but required only the skill of writing after a copy. So, the office of making and sealing *subpœnas* was granted for years, and allowed to be good; and there, several precedents are cited of offices granted for years; as, first, offices in which the safety of the realm was concerned; as, the office of warden of a haven or port by H. 6; of gunpowder, 1 Car. 1, of making gunpowder by Car. 2. Also, offices concerning the trade of the realm have been granted for years; as, 1 H. 7, of the exchange money; 18 H. 8, of gauger; 17 R. 2, of aulnager though a seal belongs to it, with which the officer is intrusted; of the letter-office, 13 Car. 1. Also, offices in courts of justice have been granted for years; as, the office of surveyor of the green-wax; of the *6d.* writs in Chancery and *subpœnas*; of comptroller and customer, and making out process in C. B. All these and several others have been granted for years; but no dispute having been made of the validity of them, how far some of them would hold at this day may be a question.

*Hard.* 351, &c.; *Hob.* 146; *Dyer*, 303; 3 *Keb.* 80; 1 *Vern.* 11, 12.

But, where one made a grant for years of the stewardship of a court-leet

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and court-baron, this was held void as to the court-leet, being a judicial office, but good as to the court-baron, being only ministerial, and the suitors judges thereof: but the grant appearing afterwards to be for years, determinable on the death of the lessee, it was held good for both; because there was no danger of its coming to executors or administrators.

2 Lev. 245; 2 Jon. 126; 6 Mod. 57.

The king may grant the office of sheriff\* (a) *durante bene placito*; and although he may determine the office at his pleasure, yet he cannot determine it for part, as for a vill, &c., nor can he abridge the sheriff of any thing incident or appurtenant to his office.

4 Co. 33 a. (a) Where a sheriff may grant to his under-sheriff to hold at will only, for he is his deputy, and according to the nature of a deputation must be removable, as an attorney is. Hob. 13; Noy, 55.—\* See the stat. 24 G. 2, c. 48.

The king may grant the office of chirographer of the Common Pleas *quamdiu nobis placuerit*, and it is good.

Dyer, 176, pl. 28.

The office of the king's Marshalsea (b) may be granted at will.

9 Co. 97; 3 Mod. 149. (b) See 24 G. 2, c. 17.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office, this is no absolute estate for life; because the rent being granted on account of the office, and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined; because it was first granted for the exercise of the office, which he is no further concerned in.

Co. Lit. 42 a.

A (c) judicial office cannot be granted in reversion; for though the grantee be never so fit at the time of the grant, he may become unfit when it takes effect.

Co. Lit. 3 b. (c) So, an office partly ministerial and partly judicial, cannot be granted in reversion; as the office of Auditor of the Court of Wards. 11 Co. 4; 2 Roll. Abr. 152.

The king may grant an estate in an office to commence *in futuro*, or upon a contingency, which estate shall arise out of the inheritance he hath in the office itself, for such he may have in point of interest, though not in execution.

But for the difference between the king's grant of an office in reversion, and such a grant in reversion by a subject, see Dyer, 80, pl. 58, 259, pl. 18; 3 Leon. 31; Hob. 150; 2 Roll. Abr. 154; Cro. Car. 279; 11 Co. 4; 8 Co. 55 b; Carth. 350; 2 Salk. 465, pl. 2; 4 Mod. 275.

It hath been adjudged, that the office of registrar being usually granted as well in reversion as possession, a grant to one of such office for life, when by the death or surrender of the present officer it shall become void, is good; for though there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habend.* after the death of the present officer; which is no more than a provision of a person to supply it when it becomes void; and if such provision has been usually made, the custom and usage (d) gives sanction to it.

Cro. Car. 279, 555; Jon. 310; 2 Roll. Abr. 153; March, 38; 3 Leon. 31. (d) But unless there have been such usage, it is not grantable in reversion. 2 Vent. 188.

|| By the statutes 22 Geo. 3, c. 75, and 54 Geo. 3, c. 61, (the former of which recites, that the practice of granting offices in the colonies and plan-

(T) Offices, by whom to be executed, and who are incapable thereof.

tations to persons resident in Great Britain had been long complained of as a grievance to his majesty's subjects in those parts,) it is enacted, that no office in any colony or plantation, or foreign possession belonging to the crown of Great Britain, shall be granted for any longer term than during such time as the grantee thereof shall reside in such colony, &c., and execute such office in person and behave well therein.

And by sect. 2, it is enacted, that in cases where the governor and council of any colony shall grant leave of absence to any person holding an office, the governor shall, within one week, report the same to one of his majesty's secretaries of state for confirmation; and if such leave is not confirmed within one month from the date of the report being received by the secretary of state, the officer shall return forthwith to the colony, or shall be deemed to have vacated his office.

Sect. 3 imposes a penalty not exceeding 100*l.* on any governor neglecting to make such report; and

Sect. 4 enacts, that returns shall be laid on the table of the House of Commons, every session, of all officers in the colonies who are not present in the execution of their duties.||

§ A temporary removal of a justice of the peace from his county, with intent to return in four months, does not vacate his office.

*Lyon v. The Commonwealth*, 3 Bibb. 430.

Offices held at the pleasure of the collector of the revenue cease with his death, removal, or resignation, unless otherwise provided by law.

*United States v. Wood*, 2 Gallis. 362.

When a person holds an office during good behaviour, with a fixed salary, and certain fees annexed thereto, the tenure cannot be altered without impairing the obligation of a contract.

*Allen v. M'Keen*, 1 Sumn. 277.

The president of the United States may, by a proper act of office, remove an officer, when he has the power to remove him, without appointing another; such removal may be express or implied.

*Bowerbank v. Morris*, Wallace's C. C. R. 118.

An officer elected "for the year ensuing," in the absence of any restrictive provision, may continue to hold and exercise his office, after the expiration of the year, until he is superseded by the election of another person in his place.

*M'Call v. The Byram Manufacturing Company*, 6 Conn. 428; *Spencer v. Champion*, 9 Conn. 436; *Bethany v. Spencer*, 10 Conn. 200. *g*

(I) Offices, by whom to be executed, and who are incapable thereof.

If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people. An (a) infant therefore is not capable of an office of stewardship of the court of a manor, either in possession or reversion.

Co. Lit. 3 b. (a) That an infant cannot be a steward, for he cannot by intendment

(I) Offices, by whom to be executed, and who are incapable thereof.

execute it; much less may he assign it over. Cro. Eliz. 636, 637, *per* Popham.—But a ministerial office may be granted to an infant, in possession or reversion, for he may exercise it by a deputy. 11 Co. 4 a.—As, where the office of registrar to the Bishop of Rochester was granted to J S, who was an infant of twelve years of age at the time of the grant, *habend.* after the death of J D, (who was the registrar in possession,) for his life, to be exercised by him or his deputy, and afterwards J D died, J S being of the age of thirty; this was held a good grant at the time of making of it, the office being to be exercised by him or his deputy. Cro. Car. 279; 2 Roll. Abr. 153; Young v. Stowel, Cro. Car. 355, 356; March, 38, S. P. adjudged; 4 Mod. 279; 2 Vent. 188; Pollexf. 136, S. P. cited, and adjudged to be law.

Lord Broke gave the office of chief prothonotary to G, but he appearing unfit, he revoked it and granted it to W, and a precedent was shown, where the office of clerk of the crown was granted by the king to one Vintner, who exhibited his patent, and desired to be admitted; and the justices of the King's Bench refused to admit him,<sup>(a)</sup> because he never had exercised that office, nor ever was brought up in it; and recommended a fit person, whom the king *ore tenus* commanded to be admitted, and was sworn.

Dyer, 150 b; Cro. Car. 567, S. C. cited; 2 And. 118, S. P. (a) If an office of learning be given to a man utterly insufficient, it is void; and though it be to him and his assigns, or to be exercised by a sufficient deputy, it mends not the case, but it must radically vest in the first grantee, before it can go in procurator or deputation to any other. Hob. 148.—If the king should grant an office in B. R., the judges may remove such an officer for insufficiency, because they are proper persons to judge of his abilities. 4 Mod. 30.

The Bishop of Gloucester granted the office of chancellor of his diocese to one S, who, because he was unskilful in the civil and canon law, was adjudged incapable.

Car. 95; Latch. 228; Noy, 91; Palm. 450; and in 4 Mod. 27, S. P. was argued, where the grant was to him or his deputy; in which case it was insisted, that insufficiency did not create an original incapacity so as to avoid the grant; because that he might appoint a deputy learned in those laws, and that if he appointed one who was unskilful, it would be a forfeiture of the office.

If the king, by his letters patent, grants the office of custody of the castle of Dunnington to a woman, to be exercised by her, or her sufficient deputy, the grant is good, and it shall not be intended a castle of war rather than a private house.

Cro. Ja. 17, Lady Russell's case.

By the 3 Jac. 1, c. 5, it is enacted, "that no (b) popish recusant convict shall exercise any public office or charge in the commonwealth, but shall be utterly disabled to exercise the same by himself or his deputy.

(b) How far dissenters from the church are rendered incapable or excused from serving any public office, vide 2 Mod. 299; 2 Vent. 247; 2 Lev. 151, 184, 242; 2 Jon. 81, 137; 4 Mod. 269; Salk. 167, pl. 1; Skin. 574; Carth. 306; 5 Mod. 431; Comb. 315; 10 Mod. 101, 179; 11 Mod. 132, pl. 11; 12 Mod. 67; 2 Stra. 1193; Ld. Raym. 29, *et supra* (E); and see the provisions of 9 G. 4, c. 17, and *ante*, p. 293; and for the recent act for the relief of Roman Catholics, see *post*, tit. *Papists*, &c.]

||By 22 Geo. 2, c. 46, § 14, it is enacted, that no clerk of the peace or his deputy, nor any under-sheriff or his deputy, shall act as solicitor, attorney or agent, to sue out any process at any general or quarter sessions of the peace to be held for such county, riding, &c., where he shall execute the office of clerk of the peace, &c.; but if any clerk of the peace or his deputy, or under-sheriff or his deputy, shall presume to act as solicitor, attorney, or agent as aforesaid, such clerk of the peace &c., shall be subject to a penalty of 50*l*.

See *Hughes v. Statham*, 4 Barn. & C. 187; 6 Dow. & Ry. 219.]

(K) Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Persons.

*§ 1. Of the Manner of executing Offices.*

SWORN officers are presumed to do their official duty correctly, (a) and every reasonable intendment must be made in favour of the acts of public officers; (b) therefore, what the officers of the state have done, the law presumes in point of regularity to be correct. (c)

(a) *Henderson's lessee v. Robertson, Cooke, 210; Blount v. Ramsay, Cooke, 489; Rogers v. Jennings' lessee, 3 Yerg. 308; 1 Tenn. R. 348; 2 Tenn. R. 421.* (b) *Cooke, 489.* (c) *Polk's lessee v. Wendell, 2 Tenn. 154; Williamson's heirs v. Buchannon, 2 Tenn. 284; Downing v. Rugar, 21 Wend. 178.*

When officers of justice stand justified in law for their acts, it is not competent to inquire into the motive which induced them to act

*Taylor v. Alexander, 6 Ohio, 146.*

When process is delivered to an officer, he acts at his peril; he is required to act in conformity to the exigency of the writ, and if he proceed to execute it, he is obliged to complete its execution. He is justified if the magistrate or court issuing it had jurisdiction.

*Lattin v. Smith, 1 Breese, 285. See 6 Ohio, 146; Hinman v. Border, 10 Wend. 367.*

Public officers must exercise their duty with fidelity, or they will, in general, be responsible to the party grieved.

*Work v. Hoofnagle, 1 Yeates, 506.*

If a person having in his store the goods of a third person, refuses to permit an officer to enter the store for the purpose of attaching the goods on a writ in favour of a creditor of the owner of the goods, the officer is justified in breaking open the door for that purpose.

*Platt v. Brown, 16 Pick. 553.*

*2. Of incompatible Offices.*

Offices are said to be incompatible and inconsistent, so as to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability: or when their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty. And this my Lord Coke says is of that importance, that if all offices, civil, ecclesiastical, &c., were only executed each by a different person, it would be for the good of the commonwealth, advancement of justice, and preferment of deserving men.

4 Inst. 100. *§* There are offices which are incompatible with each other by constitutional provision; the Vice-President of the United States cannot act as such when filling the office of President; Const. art. 1, s. 3, n. 5; and by the same instrument, art. 1, s. 6, n. 2, it is directed that "no senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house, during his continuance in office." Provisions rendering offices incompatible are to be found in most of the constitutions of the states and in some of their laws. In Pennsylvania, the acts of the 12th of February, 1802, 3 Smith's Laws of Pa. 485; and 6th of March, 1812, 5 Sm. L. Pa. 309, contain various provisions making certain offices incompatible with each other.

And hence it is, that the king himself, though he may grant an office, yet cannot execute it himself; (d) nor can the Chief Justice of B. R. be prothonotary or clerk of the papers, though he may dispose of those places.

Inst. 100. (d) Sid. 305; *§* Commonwealth v. Douglass, 1 Binn. 77, acc. *§*

(K) Of the Manner of executing them, &c.

So, if a forester, by patent for his life, is made justice in Eyre of the same forest *pro hac vice*, the forestership is become void, for these offices are incompatible; because the forester is under the correction of the justice in Eyre, and he cannot judge himself. The same law of a warden of a forest, and of a justice in Eyre of the same forest.

4 Inst. 310.

Upon a *mandamus* to restore one to the place of town-clerk, it was returned, that he was elected mayor and sworn, and therefore they chose another town-clerk; and the court were strongly of opinion that the offices were incompatible, because of the subordination. A coroner made sheriff ceases to be coroner; so, a parson made a bishop; a judge of C. B. made a judge of B. R., and the town-clerk's office is to be attendant on the mayor. In re-disseisin the sheriff is minister and judge, but that is by act of parliament; and by the (a) customs of some places the mayor has other offices annexed to his place of mayor, but here they are distinct; and the court recommended the case to the town for an amicable composition.

Sid. 305; 2 Keb. 92, *Rex v. Pergam*. (a) Upon a writ of error upon a judgment in Northampton, the error assigned was that the *ven. facias* was awarded to the two bailiffs, and the court was held before the mayor and the two bailiffs, so that the bailiffs being judges of the court could not be officers; but the court conceived it might be good by custom, and not error; for the judges are not bailiffs only, but the mayor and bailiffs; and it is a common course in many of the ancient corporations, where the bailiffs are judges, or the mayor or they be judges, yet in respect of executing process they be the officers also. *Cro. Car.* 138, *Crane v. Holland*; 4 Mod. 66, *S. C.* cited. [But this case, as is well observed by Buller, J., will not assist in the determination of the point in question. For in a writ of error in a civil action, the question, Whether the judges in the court below are properly judges or not, can never be decided; it is sufficient if they be judges *de facto*. 2 Term R. 87.]

[The corporation of Hastings consists of a mayor, twelve jurats, freemen, and a town-clerk, which latter is elected by the others, and the jurats sit as judges in a court of record, and hold pleas of the crown; and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges without being summoned. It was holden, that the acceptance of the office of town-clerk, though an inferior office, vacated that of jurat, for that these two offices were incompatible, notwithstanding there were several instances within the borough of their having been vested in the same person.

*Milward v. Thatcher*, 2 Term R. 81.] [See 3 Barn. & A. 63.]

[So, also, it was held that the offices of town-clerk and alderman in the borough of Weymouth were incompatible; for the power of removing the town-clerk being in the mayor, aldermen, and bailiffs, he would as alderman have to vote on the question as to his own amotion. And the mayor, aldermen, and bailiffs, having the power of varying or discontinuing the town-clerk's salary, he would as alderman have to vote also on that question. And Eittledale, J., said he had great doubts whether the holding the two offices by the same person was ever contemplated in the charters granted to corporations.

The King v. Tizzard, 9 Barn. & C. 418; and see *Rex v. Hughes*, 8 Dowl. & Ry. 708. As to the incompatibility of officers, see *Commonwealth v. Binns*, 17 S. & R. 231; *Respublica v. Dallas*, 3 Yeates, 316; *Commonwealth v. The sheriff of Northumberland*, 4 S. & R. 375.g

So also the offices of recorder and alderman of a borough are incompatible. *Rex v. Marshall*, cited 2 Barn. & A. 341.]

(K) Of the Manner of executing them, &c.

§ The offices of *Depositario General* and *Albacca Dativo* in Trinidad are distinct and separate, and the security for the due performance of the duties given by him in the former office not available for defaults in the latter.

Davidson v. Johnson, 1 Moore, 409.

The appointment of a person to a second office, incompatible with the first, is not absolutely void; but on his subsequently accepting the appointment and qualifying the first office is *ipso facto*, void.

The People ex rel. Whiting v. Carrique, 2 Hill, 93.

### 3. When Offices may be executed by two or more Persons.g

Ministerial offices may be granted to two, and so may also some judicial offices, which are established by act of parliament; but ancient offices cannot regularly be granted to two, nor otherwise than they have been. However, it seems to be in the discretion of the judges, if they see an office in their courts comprehend too much for one man to execute it, to put in more. But this must be where it is granted to several as one office; for if divided to two or three, the prescription is interrupted, and it is not a grant of the ancient office.

4 Mod. 17; 4 Inst. 146; Lev. 1, Keb. 1; Sid. 40; and vide Cro. Car. 138, 259; Jon. 263; Hob. 214.

Therefore, a grant of the office of chief prothonotary of the Common Pleas to two hath been held void.

Roll. Abr. 152; Hob. 153; 3 Mod. 145; 4 Mod. 17, cited.

So a grant to two to be chief justices of any of the benches hath been held void; but a grant to two to be clerks of the crown is good.

2 Roll. Abr. 152; 11 Co. 3.

If a grant be made to two of the office of one of the auditors of the Court of Wards, it is good; yet it is but one office, and partly judicial; but this is by the 32 Hen. 8, c. 46.

11 Co. 2; Auditor Curli's case, 2 Roll. Abr. 152; 4 Mod. 18, S. C. cited.

The office of forester of Waltham forest was granted to two, and held good.

Dyer, 167 a.

The clerk of the King's Bench office had granted the office of clerk of the papers to A and B, and the longest liver of them; B makes a parol surrender and prays that C should be admitted in his room, which was done accordingly; B dies; A commenced a suit against C, supposing that he had no right; but upon the trial it appeared that the plaintiff agreed that C should be admitted, which was looked upon as a surrender of the former grant, and the taking of a new one; and it was ruled accordingly.

Vent. 296; 2 Mod. 95. ¶ Where an office of justice or profit is in trust, the acts of a majority of the *cestui que trusts* may bind the rest. 3 Swanst. 180, note.]

The king granted the office of comptroller of the customs in the port of Exeter, *durante bene placito* to two; one died; and the question was, Whether the other should have the whole by survivorship? *Et per cur.*, He shall not, for there shall be no survivorship of an office of (a) trust, if it is not granted to them and the survivor.

2 Mod. 260, Arris v. Stukeley. (a) It is said in general, *per Cur.*, that if an office be granted to two, and one die, the office does not survive, but determines; as, if two sheriffs, and one die, the other cannot act: otherwise, if granted to two and the survivor of them. 2 Salk. 465, pl. 1.

## (L) Of the Execution of an Office by Deputy, &amp;c.

The Bishop of Landaff by deed granted the office of chancellor or commissary of his diocese to Doctor Lloyd and Doctor Jones, to hold the same *conjunctim et divisim* to them and to the survivor of them. Doctor Lloyd died, and the successor of the bishop granted the office to another, who sued Jones. It was agreed by counsel on both sides, that this office had been anciently and usually granted in this manner; and on a case stated out of Chancery, and referred to the judges of B. R., the only question was, Whether this was such a judicial office as could be granted in this manner? And after several arguments it was adjudged, that this was a good grant: and the principal reason of the judgment was, because of the long and constant usage; and it was said, that the offices of most of the bishoprics in England are and have been constantly so granted.

Carth. 213, Jones v. Bew; Show. 239; 4 Mod. 16; 2 Salk. 465, pl. 1; 12 Mod. 10, S. C. [Vide 1 Maul. & S. 452.]

## (L) Of the Execution of an Office by Deputy: And herein of Superiors being answerable for their Deputies.

As to the execution of an office by (a) deputy, we must observe, that there are some offices which in their nature and constitution imply a power or right of exercising them by deputy; some that in their nature cannot be exercised by deputy; and some, that by having such a power annexed to the grant or institution may be so exercised, though without such an express provision they could not.

(a) A deputy is said to be one who occupieth in right of another, and for whom regularly his superior shall answer. Perk. § 100.—The difference, says my Lord Coke, between a deputy and an assignee is, that an assignee is a person who has an estate or interest in the office itself, and does things in his own name, for which his grantor shall not answer, unless in some special cases; but a deputy has not any estate or interest in the office, but is as servant to the officer, and does every thing in the name of the officer, and nothing in his own name, and for whom the grantor shall answer. 9 Co. 49. But *per* Holt, C. J., it is said, that a deputy cannot regularly have less power than his principal, cannot be restrained from exercising any part of the office by covenant, or otherwise, must regularly act in his own name, unless it be in case of an under-sheriff, who acts in the name of the high-sheriff, because the writs are directed to him. Salk. 95.

Offices of inheritance for years, and those which require only a superintendency, and no particular skill, may regularly be exercised by deputy; such as that of (b) Earl-Marshal of England, forester, park-keeper, &c.

3 Inst. 382; Plow. 380; 9 Ca. 47; Style, 357. (b) The office of High Constable of England may be exercised by deputy. Keilw. 171 a.—John Wiltshire held lands in Heyden in Essex by grand serjeanty, to hold a towel when the king should wash his hands before dinner the day of the coronation: but he having no dignity was allowed to make a deputy. Co. Lit. 107 b.—Anne, wife of the Earl of Pembroke, held lands of the king to perform the office of naperi at his coronation; but because a woman could not do it in person, she was allowed to make a deputy; so the heir of the said earl was by tenure to carry the gold spurs before the king at his coronation; but because he was not of age, he was allowed to make a deputy. Co. Lit. 107 b.

A sheriff, though he is an officer made by the king's letters patent, and though it be not said that he may execute his office *per se vel sufficientem deputatum suum*, yet he may make a deputy, which is the under-sheriff, against whom actions may be brought by the parties grieved.

Roll. R. 274, Phelpe v. Winscombe.

And it is said in general, that when an officer hath power to make assigns, he may (c) implicitly make a deputy.

Co. 49. (c) A bishop on his creation hath power of appointing deputies, 2 Sid.



## (L) Of the Execution of an Office by Deputy, &amp;c.

138. The office of clerk of the outlawries of the Common Pleas belongs to the Attorney-General, who exerciseth it by deputy. 4 Inst. 101.

A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him; because his judgment is relied on in matters relating to his office, which might be the reason of the making of the grant to him; neither can a ministerial officer depute one in his stead, if the office be to be performed by him in (a) person; but when nothing is required but a superintendency in the office, he may make a deputy.

3 Mod. 150, cited *arguendo*. (a) Therefore the esquire of the king's person cannot assign his office; for the law supposes it to have been given him in consideration of his diligence, fidelity, and skill, 11 E. 4, 1; 2 Roll. Abr. 154.—The office of carver, being a personal trust, cannot be assigned. Dyer, 7 b.  $\beta$  A judge cannot perform any judicial act by attorney. Darling v. Gill, Wright, 70.g

It is clear, that the judges of Westminster Hall, as well as all (b) others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, nor any (c) way transfer their power to another.

9 E. 4, 30, 31 a; Bro. tit. *Judges*, 11; Perk. § 101. (b) But the judges of the ecclesiastical courts may act by deputy, as the ancient custom hath been. Latch. *Et vide supra* letter (D). (c) And therefore where the Council of the Marches of Wales referred a suit to certain persons to bear and determine it, this was held to be illegal, and a prohibition awarded to the court to stay their proceedings against the party for refusing to obey the order of the referees. Roll. Abr. 382; March, 102.—So justices of the peace cannot delegate a certain number of themselves, and invest them with a power to make rates and orders. 6 Mod. 87.

A coroner cannot make a deputy, nor an escheator; because these are judicial offices, which they must exercise in person: but it is said, that the king by special commission may appoint a deputy escheator, to inquire by office of the death of a nobleman, or, as the book seems to hold, of any other person, though under that degree.

Lill. Reg. 446.

It is held, that the office of constable being wholly ministerial, and no way judicial, he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; for the public good requires, that there should be always some officer ready at hand to execute such warrants; and the too rigorous restraint of the service of them to the proper officer could not but sometimes cause a failure of justice. But it is said, that a constable cannot make a deputy, without some such special cause.

Roll. Abr. 591; Moor, 845; Crompt. 222; 3 Bulst. 77; Dalt. c. 1; Roll. R. 274; Sid. 355; Lev. 233; March, 30; 2 Keb. 309; [Rex v. Wood, 1 Espin. Ca. 359.]

[The high constable appointed a deputy to billet soldiers under the mutiny act. This appointment was by parol only, and the deputy was not sworn. By the court.—The high constable hath power by the act to billet soldiers, and he may appoint a deputy to this particular ministerial act. This is a ministerial, not a judicial act; and a constable may appoint a deputy to do ministerial acts.

Midhurst v. Waite, 3 Burr. 1259; 1 Bl. R. 350, S. C.]

It seems the better opinion that a (d) recorder of a town cannot make a deputy without a special grant or custom for that purpose, being a judicial office relating to the administration of justice.

Keb. 639, *per* Windham, J.; and vide 1 Lev. 76. (d) A bailiff of a liberty may have a deputy. Cro. Ja. 241, 242, adjudged.

And therefore, where a writ was directed to the mayor, aldermen, and

(L) Of the Execution of an Office by Deputy, &c.

recorder of Lancaster, and the record was certified by the mayor, aldermen, and deputy-recorder, without showing that the recorder had power to make a deputy, the return was held naught.

Roll. Abr. 752, 754; Style, 183, 191, 203, 219; 2 Keb. 385.

It is held that the marshal of the King's Bench, having the inheritance of the office, with power to grant the same for life, cannot, notwithstanding, give power to such grantee for (a) life to make a deputy.

39 H. 6. 34; 2 Roll. Abr. 154. (a) That neither tenant at will nor tenant for life can make a deputy, if, in the very grant made to them, there is not an express clause for the execution of the office *per se vel sufficientem deputatum suum*. 3 Mod. 147.— See the stat. 27 G. 2, c. 17, whereby the power of appointing the marshal is vested in the crown.

[The offices of clerk of the papers, and clerk of the day-rules in the King's Bench Prison, cannot be executed by deputy.

Bryant's case, 4 Term R. 716; 5 Term R. 511.]

The office of aulnage, or sealing of cloths, cannot be exercised by deputy, being an office of trust, unless there be a clause in the patent for that purpose.

Cro. Eliz. 187, Watkins v. Johns.

Regularly a deputy cannot make a deputy, (b) because it implies an assignment of his whole power, which he cannot assign over. But if A be appointed steward of a copyhold court, to be exercised *per se vel deputatum suum*, and he appoint B his deputy, who hath long exercised the said office, and B authorize C and D jointly and severally, to take a surrender of a copyhold tenement from J S, which is done by C, without reciting his power, or any relation had to it, the surrender is good, being only a single act: for the constitution in this manner gives C the colour and reputation of an authority to act as a steward (c) *de facto*; and what he does as such is sufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it.

Stalk. 33; Ld. Raym. 658, Parker v. Kett. (b) For a deputy being only one who is authorized himself, he cannot delegate that authority; and if a deputy might make a deputy, so such second deputy, and so ad infinitum, which would be highly inconvenient. Ld. Raym. 448. (c) Where the deputy of a deputy of a customer, sitting in the customhouse with other officers, and acting as an officer, his acts were held good as an officer *de facto*, though not *de jure*; and that it would be very hard to put those who have to do with customhouse officers, to inquire into the legality of their institution. Cro. Eliz. 204.

The chief justice in Eyre may, by the statute of 32 H. 8, c. 35, make his deputies: yet all the writs of summons ancient and late are *coram the justice* and not *coram his deputies*.

10 H. 6. 28; 4 Inst. 241. [This office is now abolished and its duties vested in the Justices of the Peace, &c. See 10 G. 4, c. 50, § 95.]

It is said there cannot be an officer without deed, (d) nor can there be any deputy of an officer without deed, being a matter which lies in grant.

1 Inst. 210; 3 Mod. 147. (d) A delegation of an office is in its own nature grantable by word, and therefore though it should seem to be granted by writing, yet since it is a mere grant to the party it may be revoked by word. Ca. Law & Eq. 74.

Not the sheriff who may make an under-sheriff, or his deputy, without deed, for he is not an officer in the office, but as servant; and therefore (e) when an action is brought against the deputy of a sheriff for an escape, who pretends that the sheriff made him his deputy to take bail

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of prisoners, and that he took bond, &c., and showed no deed of deputation, yet the plea was held good on a demurrer.

3 Mod. 150. (c) Cro. Eliz. 67, *Clecott v. Denny*, adjudged.—[That a high constable may appoint a deputy by parol, see *supra* *Midhurst v. Waite*, 3 Burr. 1259.]

By the statute of 2 H. 6, c. 10, it is ordained, "That all officers made by the king's letters-patent within the king's courts, who have power and authority, by virtue of their offices of old time accustomed, to appoint clerks and ministers within the same courts, shall be charged and sworn to appoint such clerks and ministers, for whom they will answer at their peril."

4 Inst. 114, 115; 2 Lev. 121.

Upon the rule of *respondet superior*, regularly, all officers shall answer for their (a) deputies, in the same manner as if the act were done by themselves, unless it be in criminal cases; and therefore sheriffs shall answer for the escapes, amerciaments, &c., of their deputies, &c.

4 Co. 33; 2 Inst. 466; 2 Lev. 160; Dyer, 278. (a) But if a clerk in an office mis-enter any thing, he himself shall be punished, and not the master of the office, because he takes a fee for it. Leon. 146; and vide Hob. 13.

[A constable shall answer for his deputy upon any miscarriage, unless the deputy is allowed and sworn; for then the deputy is constable.

Wood's Inst. b. 1, c. 7.]

If the coroner be insufficient, the whole county who made election and choice of him shall *tanquam elector et superior* answer for him.

2 Inst. 466.—So, the lord of a franchise shall answer for a bailiff put in by him. 2 Lev. 160.

If a person be appointed customer or collector of the customs in a certain port, who is empowered, by the statute 1 Eliz. c. 12, to appoint a deputy, and a deputy so appointed by him conceal the goods of a merchant, and the customer himself, being ignorant thereof, return on oath into the Exchequer the customs of this port, according to the information of his deputy; he shall, notwithstanding his ignorance, answer for the act of his deputy, and shall forfeit treble the value of the merchandise, and be fined, &c., pursuant to the statute 3 Hen. 6, c. 3.

Dyer, 238 b, pl. 38, adjudged in the Exchequer-chamber, as Saunders, C. B. informed the reporter.

If a deputy suffers escapes, it is a forfeiture by the principal, unless such deputation be made for life, and then the grantee for life only forfeits the office.

Dyer, 278; Cro. Eliz. 534; Poph. 119; 2 Lev. 71; Raym. 216; 3 Mod. 146; 3 Lev. 288, like point.

It is said, that if one put in a deputy, without any allowance of salary, he has no remedy but by *quantum meruit*, and that against his principal.

6 Mod. 235.

It hath been held, that though a *mandamus* will not lie for a deputy, that yet it lies for him who deposes him, to have such his deputy either admitted or restored; for that otherwise he might be deprived of his power to make a deputy. And in this case, on a *mandamus* to restore a deputy secretary of the courts of Marches, it was held to be no good return, that at the time of the writ delivered he was not constituted deputy, for that they might have put him out of his place before the writ came to them.

Lev. 306; 2 Keb. 738, 742; Vent. 110, 111, S. C. adjudged because returns must be certain, there being nothing to be pleaded to them.

## (M) Of the Forfeiture of an Office.

[By 5 Geo. 4, c. 82, intituled, *An Act for the better regulating the office of the clerk of the parliaments*, § 2, it is enacted, that after the expiration of the existing letters patent, the clerk of the parliaments shall be appointed by his majesty, his heirs and successors; but that such clerk shall execute the duties of the office in person, and be removable by his majesty on an address to the House of Lords.]

Where the powers of commissioners of police extended only to the raising and applying the funds, and not to the appointment of the officers, held, on appeal, that they could not be proceeded against, through their solicitor, for any neglect committed by any of the officers.

*Thompson v. Mitchell*, 7 Cl. & Fin. 564. See *Duncan v. Findlater*, 6 Cl. & Fin. 894.

The steward of the court baron is a judicial officer and not responsible for the acts of the bailiffs of his court, to whom the process is directed: *aliter*, when he directs it to a bailiff specially named by the party, upon an indemnity taken by him.

*Bradley v. Carr*, 3 Scott, N. S. 523. See *Holroyd v. Breare*, 2 B. & Ald. 473.

## (M) Of the Forfeiture of an Office.

It is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, that in these cases the office is forfeited.

11 E. 4, 1 b; 2 Roll. Abr. 155.

But herein it will be necessary to consider more minutely, what shall be said such acts as are contrary to the duty of his office, and how far the same, whether they be acts of omission or commission, amount to a forfeiture; wherein it hath been clearly agreed, that a (a) jailer by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in jail after they have been legally discharged and paid their just fees, forfeits his office; for that in the grant of every office it is implied that the grantee execute it faithfully and diligently.

Co. Lit. 233; 9 Co. 52; 3 Mod. 143. (a) If a sheriff suffer felons to escape voluntarily, it is a forfeiture of his office, though the office be for life or in fee. *Dyer*, 151 b, *Sir John Savage's case*; 2 Roll. Abr. 155; 2 Bulst. 58; 3 Mod. 146, S. P.

But it is held, that one negligent escape is not a forfeiture, though one voluntary one is; but that two negligent escapes amount to a forfeiture.

39 H. 6, 33; 2 Roll. Abr. 155; 2 Vern. 173; and see stat. 8 & 9 W. 3, c. 27, tit. *Justs and Gaolers*, letter (D), vol. iv.

There are, says my Lord Coke, three causes of forfeiture or seizure of offices by matter in deed. 1. By abuser; 2. Non-user; 3. Refusal. 1. By abuser; as by a marshal or other jailer's permitting escapes. 2. By non-user; in which there is this difference, when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without any demand or request, there, by non-user or non-attendance the office is forfeited; but, where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there, without such demand or request, there can be no forfeiture. And herein also, my Lord Coke in another place takes the following diversity, viz. that non-user of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a public one, which concerns the administration of justice. 3. As to refusal, he says, that in all cases where an officer is

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bound upon request to exercise his office, if he does not do it upon request, he forfeits it; as, if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture.

6 Co. 50; Co. Lit. 233 b. And where non-attendance or non-user of an office is forfeiture, vide 2 Roll. Abr. 155; Keilw. 194; Dyer, 151; 3 Mod. 146; 4 Mod. 29. —That non-attendance is a good cause of the forfeiture of the office of recorder. Salk. 435. [2 Ld. Raym. 1237. But the bare being absent, without any particular circumstance of aggravation, will not induce a forfeiture. *Rex v. Corporation of Wells*, 4 Burr. 199.] Where to a *scire facias* to repeal the patent of a searcher of a port for non-attendance, the officer pleaded that he was sick, and that he was confined in prison at the king's suit, vide Cro. Car. 491, 492.

The king granted to the Abbot of St. Alban to have a jail, and to have a jail-delivery, and divers persons were committed to that jail for felony; and because that the abbot would not be at the expense of making deliverance, but had detained persons in prison a long time, it was resolved, that the abbot had for that cause forfeited his franchise, and that the same might be seized into the king's hands.

2 Inst. 43.

If a *scire facias* be brought to repeal the patent of a searcher of the customs in a port-town for non-attendance; and upon evidence it appear, that such a ship was imported and unladen, and others also were exported beyond seas, not being searched, and that when these ships were so imported or exported, neither the searcher himself, nor any of his deputies were there, though it does not appear to be by negligence or voluntarily, yet this voluntary absence and neglect, so as neither himself nor servants were there to search, is not only *crassa negligentia*, but a voluntary permission and forfeiture.

Cro. Car. 491, *The King v. Rook*, adjudged; 3 Mod. 146, S. C. cited.

So if a jailer should leave his prison doors unlocked, and the prisoners escape, it is not only a negligent but a voluntary escape.

Cro. Car. 492, *per Cur.*

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; and therefore if the office of forester, &c. descend to an infant or feme covert, (where by law they may so descend,) and these are not exercised by sufficient deputies, they become forfeited.

Co. Lit. 233 b; 8 Co. 44; Cro. Car. 556; Hard. 11.

If a parker or a forester cut a tree, not for browse or reparations, this is a forfeiture in law of his office: because he breaks the condition in law annexed to his office, which is, that he will preserve the game, and not do any thing that may impair or destroy them. But other books hold, that the cutting down of trees is no forfeiture, if he leaves sufficient for browse and shade for the deer, and to cover them.

9 Co. 50 a; Cro. Eliz. 285; And. 29, Poph. 117; *Cont. Moor*, 707; 2 Mod. 121.

Insufficiency is an original incapacity which creates the forfeiture of an office. So if a superior puts in a deputy into an office, which may be exercised by deputy, who is ignorant and unskilful, this is a forfeiture of the office.

4 Mod. 29, *arguendo*.

If the king grants an office in any of the courts at Westminster, the judges

## (M) Of the Forfeiture of an Office.

may remove such an officer for insufficiency, and are the proper persons to judge of his abilities.

4 Mod. 30, *arguendo*. Where an officer may be removed, but cannot be abridged of his fee. Roll. R. 82, 83.

A filazer of C. B. being absent two years, and having farmed out his office from year to year, without the license of the court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by words spoken openly in court. And though there was no record made of the discharge, nor any legal summons for him to answer to any accusation, yet the discharge was held good.

Dyer, 114 b, pl. 64; Roll. Abr. 155, S. C.

An officer was turned out, because that he *spoliavit quædam recorda contra officii sui debitum*; and it was objected, 1st, That it was not certain enough, because not shown what records; to which the court answered, that it would be prolix, and then he having spoiled the records, they are not now to be had. 2d Objection, That it may be he did it by chance, and not wilfully; to which the court said, that the conclusion *contra officii sui debitum* included that.

Keb. 597, Pilkington's case. Clerk of the peace indicted and removed for not delivering the records to the new *custos rotulorum*. 4 Mod. 31, 32; Show. 282; 12 Mod. 13. [On the removal of the clerk of the peace, the evidence need not be set out in the order. Rex v. Lloyd, 2 Stra. 996.]

If A hath the custody of a castle with all profits, &c., granted to him for life, of which the inheritance hath been granted to B, and A refuses B to let him inhabit in the house, this is a forfeiture in A.

Cro. Js. 17, 18.

If tenant in tail of an office commit a forfeiture, this shall bind the issue, by force of the condition tacitly annexed by law to such estate. But, if an officer for life commit a forfeiture, this shall not affect him who hath the inheritance.

11 E. 4, 1; 90 E. 4, 56; 39 H. 6, 32; 22 Ass. 34; 8 H. 4, 18; 14 H. 7, 1; 2 Roll. Abr. 155; 7 Co. 34; Poph. 119; 2 Lev. 71; Raym. 216; 3 Lev. 288; 3 Mod. 146; Skin. 114; 2 Vern. 173; 2 Vent. 189, 269; Bridgm. 27.

The Archbishop of Canterbury granted the office of guardian and keeper of Alynghton Park to Sir Edward Nevil, and to Henry, one of his sons, with a certain fee during their lives, and the longest liver of them, which was confirmed by the prior of Christ Church Canterbury, to be exercised by them, or their sufficient deputy, for whom they shall answer: Sir Edward was attainted; and the question was, if the king should have the office by the attainder? and it was resolved, that being only an office of skill and confidence, the same was not forfeited to the king, but that the survivor should hold the same with the profits incident thereto.

Plow. 378, Sir Henry Nevil's case.

But if the king grants an office which concerns trust and diligence to two, and one of them is attainted, the entire office is forfeited to the king; for he cannot make one to occupy in common with another.

Plow. 180.

Wherever an officer who holds his office by patent commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his

(N) Where for Corruption Officers are punishable, &c.

right appearing of record, the same must be defeated by matter of as high a nature.

But for this vide Dyer, 155, 198, 211; 9 Co. 98; Co. Lit. 233; Cro. Car. 60, 61; Sid. 81, 134; 8 Co. 44, b; Roll. Abr. 580; 3 Mod. 335; 3 Lev. 288.

||By stat. 49 Geo. 3, c. 118, s. 3, any person accepting by himself, or by any person in trust for him, any office, place, or employment, on an agreement to endeavour to procure the return of any member to parliament, shall forfeit such office, &c., and be incapable of holding the same, and shall forfeit 500*l.*; and any person holding any office under his majesty, who shall give such office to any person on any such agreement, shall forfeit 1000*l.*

By 47 Geo. 3, c. 20, his majesty is empowered to appoint the chancellor of the exchequer for Ireland to be a lord commissioner of the treasury in England without a salary, and such appointment shall not vacate his election as a member of the House of Commons.

Two acts have been passed respecting the securities to be given by persons holding public offices. The 50 Geo. 3, c. 85, intituled, *An act to regulate the taking securities in all offices in respect of which security ought to be given, and for avoiding the grant of all such offices, in the event of such security not being given within a time to be limited after the grant of such office*, enacts, that every person who shall be appointed to any office, civil, or military, in any public department in England, or to any such office of public trust under the crown, or wherein he shall be concerned in the receipt of public moneys, and who, by reason thereof, shall be required to give security, shall within one month after notice of such appointment, if he shall be in England, (or within extended periods if he shall be abroad,) enter into a bond or security in such sum, and with such sufficient sureties as shall be approved of by the lords of the treasury, or the principal officer of the department, for the due performance of his trust, and duly accounting for all moneys intrusted to him.

The 52 Geo. 3, c. 66, repeals and amends some of the subordinate provisions of the former act, extends the act to Scotland, but not to Ireland, and provides that an officer shall be appointed in every department for keeping and registering the securities of the officers of the department, and that such securities shall be registered with such officer within the time, and under the penalties enacted by the former act, as to registering securities under that act.||

(N) Where for Corruption and oppressive Proceedings Officers are Punishable: And herein of Bribery, Extortion, & Neglect of Duty.¶

THERE can be no doubt but that all officers, whether such by the common law or made pursuant to statute, are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their offices, &c.

That if a man be made an officer by act of parliament, and misbehave himself in his office, he is indictable for it at common law, as is every public officer, who misbehaves himself in his office. 6 Mod. 96. ¶ Although every judge has the right to deliver his opinion on every subject that comes before the court, yet it is not an indictable offence for a presiding judge wilfully to prevent one of his associates from delivering his opinions to the grand jury. *Commonwealth v. Addison*, 4 Dall. 225.¶

¶ A judge cannot be challenged or excepted to for corruption, but must be punished by indictment or impeachment.

*M'Dowell v. Van Deusen*, 12 Johns. 356.

(N) Where for Corruption Officers are punishable, &c.

Whenever an act of the legislature creates an office unknown before, the officer appointed to fill the place is subject to the control of the supreme tribunals of justice, and may be punished for misbehaviour or excess of his authority.

*Geter v. Commissioners, &c.*, 1 Bay, 354.*g*

But besides the punishment by indictment, information, &c., all courts of record have a discretionary power over their own officers, and are to see that no abuses are committed by them, which may bring disgrace on the court themselves. Also, the Court of King's Bench, by the plenitude of its power, exercises a superintendency over all inferior courts, and may grant an attachment against the judges of such courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice.

*Dyer*, 918; *Palm*. 564.

As to extortion by officers it is so odious (being more heinous, as my Lord Coke says, than robbery, as it is usually attended with the aggravating sin of perjury) that it is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed; and is defined to be the taking of money by any officer by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

*Co. Lit.* 368 b; 2 *Inst.* 909; 10 *Co.* 102; 2 *Roll. Abr.* 32, 57; *Cro. Car.* 438, 448; *Raym.* 315.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of Westm. 1, 3 Ed. 1, and therefore such fees may be legally demanded and insisted upon, without any danger of extortion.

21 H. 7, 17; *Co. Lit.* 368. [See 3 G. 4, c. 69, enabling the judges of the courts at Westminster to regulate the fees of the officers and clerks of the several courts.]

Also it seems, that an officer who takes a reward which is voluntarily given to him, and which has been usual in certain cases for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a premium it would be impossible in many cases to have the laws executed with vigour and success.

2 *Inst.* 910; 3 *Inst.* 149; *Co. Lit.* 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made.

*Roll. Abr.* 16; *Roll. R.* 313; *Noy*. 76; *Jon.* 65; *Cro. Eliz.* 654; *Moor.* 468; *Cro.* 14, 148.

If an indictment of extortion charges J S with the taking of 50s. as bailiff of a hundred whereof he took without showing for what he took it, this is good, at least after verdict, for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise excused.

And 21, *The King v. Green*. (a) That an information for extortion must set forth the time when the offence was committed. 4 *Mod.* 101, 103.—That the Court of King's Bench will not quash an indictment for extortion or oppression, though erroneous, but will oblige the party to plead or demur to it. 3 *Mod.* 13.

As to bribery, it is said, in a large sense, to be the receiving or offering



## (O) Of the civil Liability of the Officer.

of an undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity; but that in a strict sense, it signifies the taking of any thing valuable by one in a judicial place, of any one who hath to do before him any way, for doing his office or by colour of his office, but of the king only. Also it signifies the taking or giving a reward for offences of a public nature, which manifestly tending to discourage men, and to introduce all kinds of corruption, is highly punishable by the common law.

*Fortescue de Laud. c. 51; 3 Inst. 145, 149; Hob. 9; Cro. Ja. 65.*

And these several offences are so odious in the eye of the law, that they are punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment. It is also said, that at common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the statute 25 Edw. 3, st. 5, c. 2.

*3 Inst. 145; Leon. 291; Cro. Ja. 65; Rushw. Collections, part 1, fol. 31.*

Also, it is said in general, that all wilful breaches of the duty of an office are forfeitures of it, and also punishable by fine, &c.; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution. But the particular instances wherein a man may be said to act contrary to the duty of his office, though various, are yet so generally obvious, that it seems needless to endeavour to enumerate them.

*Co. Lit. 233, 234.*

§ Neglect of a duty by an officer, which is enjoined by law, as that of an inspector at an election, is indictable at common law.

*2 Johns. Ch. R. 277, n.*

## (O) Of the civil Liability of the Officer.

A judicial officer acting honestly in a case where he has jurisdiction of the matter and of the persons, is not liable to the party prejudiced by his mistakes of the law.

*Briggs v. Wardwell, 10 Mass. 356; Lincoln v. Hapgood, 11 Mass. 350; 2 Dall. 160; 1 Yeates, 443; 2 Nott & M'Cord, 168; 1 Day, 315; 1 Root, 211; 3 Caines, 170; 5 Johns. 282; 9 Johns. 395; 11 Johns. 150; 3 Marsh. R. 76; 1 South. 74; 1 N. H. Rep. 374; 2 Bay, 1, 69; 8 Wend. 468.*

A public officer who is by law required to act in certain cases, according to his judgment or opinion, sworn to discharge his duties, and subject to penalties for neglect, is not liable to a party for an omission, arising from neglect or want of skill, if acting *bond fide*.

*Seaman v. Patton, 2 Caines, R. 312; Jenkins v. Waldron, 11 Johns. 114; Vanderheyden v. Young, 11 Johns. 150.*

A judge is acting ministerially in allowing a writ of *habeas corpus*, and, if he refuse, he is liable for the penalty of the act; but after the prisoner is brought before him, he acts in his judicial capacity, and is not liable for what he then does or refuses to do.

*Cunningham v. Bucklin, 8 Cowen, 178. See Yates v. Lansing, 5 Johns. 282.*

## Outlawry.

When courts of limited jurisdiction exceed their powers, the proceedings are *coram non iudice*, and all concerned in such void proceedings are liable to an action of trespass.

8 Cowen, 178; 5 Johns. 282.

An officer intrusted by the common or statute law is liable to an action for negligence in the performance of his trust or duty, or for fraud or neglect in the execution of his office.

Jenner v. Joliffe, 9 Johns. 381.

The officers of a court, who have the custody of property seized, pending the suit, are responsible for any loss or injury sustained by want of due diligence.

Burke v. Trevitt, 1 Mason, 96.

An action cannot be maintained against a ministerial officer for not executing a void process, or process founded on a void judgment, or for suffering a prisoner arrested on such process to escape. But the law is otherwise when such process or proceedings are merely irregular and not void.

Albee v. Ward, 8 Mass. 79.

If a purchaser at a sale on execution loses his title to the property in consequence of a neglect of the officer to comply with the requisitions of the law, he has a remedy by action on the case against the officer.

Sexton v. Nevors, 20 Pick. 451.

In general an action on the case will lie against any ministerial officer for a neglect of duty, by which another is injured.

Somerall v. Gibbs, 4 M'Cord, 547.

Although a ministerial officer is protected while acting within legal authority; yet if the selectmen of a town make out a rate-roll on assessments, which are illegal and void, and cause a warrant to be issued thereon, they are responsible to those whose property is taken under such warrant.

The Thames Manufacturing Company v. Lathrop, 7 Conn. 550.

## OUTLAWRY.

OUTLAWRY is a punishment inflicted on a person for a contempt or contumacy, in refusing to be amenable to, and abide by, the justice of that court which hath lawful authority to call him before it. And as this is a crime of the highest nature, being an act of rebellion against the state or community of which he is a member, so doth it subject the party to divers forfeitures and disabilities: for hereby he loseth *liberam legem*, is out of the king's protection, &c.

11 Co. 104; 1 Inst. & Stud. dial. c. 3; Roll. Abr. 302.

And as to forfeitures for refusing to appear, herein the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as ~~in~~ outlawries in treason and felony, the law interprets the party's absence

## Outlawry.

a sufficient evidence of his guilt, and, without requiring further proof or satisfaction, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his whole estate, real and personal.

Co. Lit. 128; 3 Inst. 161.

But outlawry in less crimes, or in personal actions, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate: it is, however, very fatal and penal in its consequences: for hereby he is restrained of his liberty, if he can be found, forfeits his goods and chattels, and the profits of his lands while the outlawry remains in force.

Plow. 541; 9 H. 6, 20 b; Show. Parl. Ca. 73.

It hath been said, that anciently any one might as lawfully kill a person outlawed as he might a wolf, or other noxious animal; (a) but that the law herein was changed in Edward III.'s time, which provides, that a person outlawed shall be put to death by the sheriff only, having lawful authority for that purpose.

Co. Lit. 128 b. [(a) But this is a vulgar error, for though an outlaw was said *caput gerere lupinum*; yet it was never permitted any who met him to kill him with impunity, but only in case he would not surrender himself peaceably; for if he made no attempt to fly, his death would be punished as that of any other man: though it seems that in the counties of Hereford and Gloucester, in the neighbourhood of the marches of Wales, outlaws were treated as having *capita lupina*. Bracton, 128 b.]

Also, from the heinousness of the offence, the sheriff may, on a *capias utlagatum*, break open the house of the person outlawed; for it would be unreasonable, that this privilege or protection, allowed of in other cases, should be extended to him who is declared a contemner and violater of the law; and therefore, the seizing him as an outlaw, both imply the liberty of entering and seizing him wheresoever he lies hid.

2 Hal. Hist. P. C. 202; 9 Co. 91; Bulst. 146; Cro. Eliz. 908; Moor. 606, 668; Yelv. 28; Cro. Car. 537; 4 Leon. 41; 2 Jon. 233.

But, as the punishment of outlawry is of a very severe nature, the law hath provided and takes great (b) care that no person should be outlawed without due notice, and apparent contempt to the court; as will appear under the following head:

4 Burr. 2551. (b) That no person is to be outlawed *nisi per legem terræ*. 2 Inst. 47. That three *capiases* are required, and the party to be called in five county courts, a month between every court. Bract. lib. 3, tract. 2, c. 11.

(A) In what Cases Process of Outlawry lies.

(B) By what Jurisdiction such Processes are to issue.

(C) Against whom Process of Outlawry may be awarded: And herein,

1. *Whether it may be awarded against a Peer.*

2. *Whether Process of Outlawry may be awarded against an Infant.*

3. *Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.*

4. *Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.*

5. *Of awarding Process of Outlawry against Principal and Accessory.*

(D) What Forfeitures and Disabilities an Outlawry subjects the Parties to: And herein,

1. *Where it is of the same Effect with a Sentence or Judgment.*

2. *Of the Forfeiture as to Lands, Goods, &c.: and herein of the Difference between*

(A) In what Cases Process of Outlawry lies.

*Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had: And herein,*

1. Of the Difference between a Forfeiture in a Criminal and Civil Case.
2. What Things are forfeited by the Outlawry.
3. To what Time the Forfeiture shall relate.
4. Of the King's and Party's Interest at whose suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.
3. *Of the Party's Disability to bring any Action.*
4. *What further Disabilities Outlawry subjects the Party to.*
- (E) Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reversed: And herein,
  1. *Where, for want of such Process as is required by Law, the Outlawry may be reversed.*
  2. *Where, for want of Form in such Processes, the Outlawry may be reversed.*
  3. *Where, for Variance in such Processes, the Outlawry may be reversed.*
  4. *Where, for a defective Execution and Return, the Outlawry may be reversed: And herein,*
    1. To whom such Process is to issue and be directed.
    2. To what Place the Process is to issue: and herein of the *Quinto exactus*, and Proclamation on an Outlawry.
    3. What shall be said a good Execution and Return.
- (F) Of the Manner of reversing an Outlawry: And herein of the Difference between Errors in Fact and in Law.
- (G) What the Party must do in order to entitle him to a Reversal: And herein,
  1. *Of appearing in Person, or by Attorney, and giving Bail.*
  2. *Of suing out a Scire facias.*
- (H) The effects and Consequences of a Reversal: And herein,
  1. *Where the Proceedings on the Reversal are in the same Plight as if no Outlawry had been.*
  2. *To what the Party shall be restored on Reversal of the Outlawry.*

(A) In what Cases Process of Outlawry lies.

It seems, that originally process of outlawry only lay in treason and felony, and was afterwards extended to trespasses of an enormous nature. And herein it is laid down by Serjeant a) Hawkins, that process of outlawry at this day lies in all appeals and in all indictments of treason or felony, and in all indictments of trespass *vi et armis*; and on all returns of rescous; and, as it seems probable, in all indictments of conspiracy or deceit, or other crimes of a higher nature than trespass *vi et armis*; but that it lies not on an *averment*, or, an indictment, on a (b) statute, unless it be given by such statute, either expressly, as in the case of *premunire*; or impliedly, as in cases made treason or felony by statute, or where a recovery is given by an action in which such process lay before, as in the case of a (c) forcible entry.

Summ. 100; Hist. iii. Outlawry. 36, 36, 59; Co. Lit. 128 b; Dyer, 213, 214. 10th Hand p. 113, 114, and several authorities there cited. (b) It does not lie in an indictment on the statutes against forestalling. 21 Edw. 4, 11 b; 2 Hal. Hist. p. 114. (c) On a conviction by justices on view of a forcible entry, process of outlawry lies. 1 Ark. 322. — Whether the common law gives process of outlawry against common law misdemeanors, being merely obstructive breaches of the peace, was questioned; in the

## (A) In what Cases Process of Outlawry lies.

case of the King v. Wilkes on a libel. But Lord Mansfield, in delivering the judgment of the Court of King's Bench, spoke at large to prove that such process lies against crimes *universally*. 4 Burr. 2537. However, the reasoning on which this opinion is grounded stands opposed by a former judgment of the Common Pleas on a prior case relative to the same offender. 2 Wils. 151. But it was adopted by both Houses of Parliament, when in Wilkes's case they resolved, that privilege of parliament doth not extend to *libels*. See Ann. Reg. 1764.]

In an assize *capias pro fine* lies, and upon that, process of outlawry, if the assize be found with force; but being a mixed action, as savouring of the realty, it is out of the statute of additions, 1 H. 5, c. 5, which extends only to personal actions, appeals, and (a) indictments.

2 Inst. 665; 6 Mod. 85. (a) But a presentment is the same with an indictment, on which process of outlawry lies. 2 Leon. 200.

So process of outlawry lies in replevin, and is given by the statute 25 Edw. 3, c. 17, which gives the *capias* in this manner: when on the *pluries replegiari facias* the sheriff returns *averia elongata*, then a *capias in withernam* issues, and on that being returned *nulla bona*, a *capias* issues, and so to outlawry; but it does not lie on the original writ of replevin, which is *vicontiel* and determined; and therefore as no addition is required in such original writ, so neither ought there to be any in the second writ; for where a writ of process is founded on a former it must pursue the former, and cannot vary from it.

6 Mod. 84; Salk. 5, Earl of Banbury v. Wood; 2 Ld. Raym. 987.

By the common law, in all actions of trespass *quare vi et armis*, and in which there is a fine to the king, a *capias* was the process; and herein process of outlawry lay by the common law.

35 H. 6, 6 b; 22 H. 6, 13; Rast. Ent. 293; 10 Co. 72; 2 Roll. Abr. 805.

But in account, debt, (b) detinue, annuity, covenant, and such actions as are grounded upon negligence or laches merely, no *capias* lay at common law, but only summons and distress infinite; and therefore, the *capias* and outlawry in these actions were introduced by divers acts of parliament. (c)

Co. Lit. 128 b; 3 Co. 12; 2 Bulst. 63; 2 Inst. 143; Cro. Ja. 222, 261; Yelv. 158; Raym. 128; Keb. 890, 908; Sid. 248, 258. (b) Whether process of outlawry lies in a writ of detinue of charters. Dyer, 223 a, *dubitatur*. [(c) This opinion, that the writ of *capias* did not lie at common law for debt and damages, is contradicted by the history of our legal process. For in the reign of Henry III., the process in all personal actions was as follows:—If the party did not appear upon the summons, he was attached by pledges; and afterwards by better pledges: if he still did not appear, the sheriff was commanded *quod habeat corpus*: if the sheriff returned *non inventus*, there issued a *distingas per terras et catalla*; after that, another *distingas* commanding him also to take the body; after that another *distingas, ne manum apponat*; and lastly, a writ to take the lands and chattels into the king's hands. Thus there might be one summons, two attachments, a *capias* (as it was afterwards called,) and four distresses. To this, it is added by Bracton, that should the defendant not be found, nor have any lands or goods, whether the action was for money or for a trespass, he was to be demanded from county to county, and outlawed: and persons so outlawed were condemned to perpetual imprisonment, or to abjure the realm. Bract. 440, 441; Reeves' Hist. of the Law, vol. i. 483, 484; vol. 2, 439.]

By the statute of Marlebridge, 52 Hen. 3, c. 23, the writ of *monstravit de compoto* was given, where before, the process in account was summons, attachment, and distress infinite; and by Westm. 2, 13 Edw. 1, stat. 1, c. 11, process of outlawry is given in account.

2 Inst. 145, 380; F. N. B. 259.

By the 25 Edw. 3, c. 17, it is accorded, that such process shall be made in a writ of debt and detinue of chattels, and taking of beasts, by writ of

(B) By what Jurisdiction such Processes are to issue.

*capias*, and by process of exigent, by the sheriff's return, as is used in a writ of account.

Co. 12; 2 Roll. Rep. 295; 2 Bulst. 63.

And by the 19 Hen. 7, c. 9, reciting, "That forasmuch as before this time there have been great delays in actions of the case that have been sued as well before the king in his bench, as in the court of his common bench, by reason of which delays many persons have been put from their remedy; it is therefore ordained, enacted, and established, that like process be had hereafter in actions upon the case as well sued and hanging, as to be sued in any of the said courts, as in actions of trespass or debt."

But it hath been adjudged, that process of outlawry lies in no case but where a *capias* lies; and that, therefore, where the proceeding is by bill and not by original, as there can be no *capias*, so there can be no process of outlawry, as in a bill of privilege by or against an attorney.

Leon. 329; 2 Roll. Abr. 76; Sid. 159; Keb. 577.

(B) By what Jurisdiction such Processes are to issue.

It is clear that the courts at Westminster may issue process of outlawry, and that the Court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may issue process of *capias* and exigent into any county of England, upon a *non est inventus* returned by the sheriff of the county where the party is indicted, and a *testatum* that he is in some other county.

2 Hal. Hist. P. C. 198.

Justices of oyer and terminer may issue a *capias* or exigent, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county where they held their session at common law; and by the statute of 5 Edw. 3, c. 11, they may issue process of *capias* and exigent to all the counties of England, against persons indicted or outlawed of felony before them.

2 Hal. Hist. P. C. 31, 199.

But justices of jail delivery (a) regularly cannot issue a *capias* or exigent; because their commission is to deliver the jail *de prisonibus in ea existentibus*, so that those whom they have to do with are always intended in custody already.

2 Hal. Hist. P. C. 199. (a) But now they have commissions of oyer and terminer, and other commissions, &c., giving them full power in all cases.

Justices of the peace may make out process of outlawry upon (b) indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of the peace, by the statute of 1 Edw. 4, c. 1; but the power of the sheriff, to make any process upon indictments taken before him, is taken away by that statute.

2 Hal. Hist. P. C. 199. (b) Justices of assize, justices of *nisi prius*, justices of oyer and terminer, and justices of jail delivery, and also justices of the peace in their session, may proceed to outlawry in cases of indictments found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 Jac. 1, c. 4; 2 Hal. Hist. P. C. 52.—But they cannot issue a *capias utlagatum*, but must return the record of the outlawry into the King's Bench, and there process of *capias utlagatum* shall issue. Dalt. 406; 2 Hal. Hist. P. C. 52.

(C) Against whom Process of Outlawry may be awarded.

It is made a *quare* by Hale, whether a coroner can by law make out a process of outlawry against a man indicted by inquisition before him.

2 Hal. Hist. P. C. 199. *Per* Hawkins, a coroner may award process until the exigent on a bill of appeal before him; and that by the better opinion, such process shall be awarded by him only, and not by him and the sheriff jointly, and that he may proceed thereon to outlawry; but that since *Magna Charta*, c. 17, by which it is enacted, *That no sheriff, constable, coroner, or other bailiff of the king, shall hold pleas of the crown, he cannot proceed to the trial of the appellee.* 2 Hawk. P. C. c. 9, § 41, and several authorities there cited.

It hath been held, that though the process in inferior courts be a *capias*, that yet they cannot proceed to outlaw the person.

Yelv. 158; Cro. Ja. 222, 261; Raym. 128; Sid. 248, 259; Keb. 890, 906.

The process to the outlawry, viz. the *capias* and exigent, must be in the king's name, and under the judicial seal of the king appointed to that court that issues the proofs, and with the (a) *teste* of the chief justice or chief judge of that court of sessions.

2 Hal. Hist. P. C. 199. (a) Where the *capias* was *este* *Edmundo Anderson*, without a *T*, for this error the outlawry was reversed; for the *teste* is the warrant of the writ, as it is of all judicial writs. Cro. Eliz. 592, *Gronby v. Ischam*.

(C) Against whom Process of Outlawry may be awarded : And herein,

1. *Whether it may be awarded against a Peer.*

If a nobleman, or peer of the realm, be indicted and cannot be found, process of outlawry shall be awarded against him, and he shall be outlawed *per judicium coronatorum*.

2 Inst. 49; 3 Inst. 31; Staunf. 130; 2 Hawk. P. C. c. 44, § 16.

But in civil actions between party and party, regularly, a *capias* or exigent lies not against a lord of parliament of England, whether secular or (b) ecclesiastical; yet, in case of an indictment for treason or felony, yea, but for a trespass *vi et armis*, as, an assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence is a contempt against him: and therefore, if a rescue be returned against a peer, or, if a peer be convict of a disseisin with force, or deny his deed, and it be found against him, a *capias pro fine* and exigent shall issue, for the king is to have a fine: and the same reason holds upon an indictment of trespass or riot, and much more in the case of felony.

2 Hal. Hist. P. C. 199, 200; Cro. Eliz. 170, 503; 5 Co. 54; Roll. Abr. 290. (b) That an abbot or prior ought not to be outlawed. 3 E. 3, 2 Roll. Abr. 805.

2. *Whether Process of Outlawry may be awarded against an Infant.*

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous; but an infant under the age of fourteen cannot be outlawed, for if he be, it is erroneous.

3 H. 5; Ulrag. 11; Fitz. tit. *Outlawry*, 11; 2 Roll. Abr. 805; Dyer, 104; 2 Hal. Hist. P. C. 207, 208. ¶ But, according to Bracton, twelve is the age at which a person could be outlawed; for every male at that age either was, or ought to be, enrolled in some *decenna* or *manupastus*; and as he was then *infra legem*, he was then capable of being declared *ex lex*. Bracton, 125; Co. Lit. 128 a. ¶

But the outlawry of such infant is not void, it being of record, but voidable only by writ of error.

Dyer, 239 a; 2 Roll. Abr. 805.

(C) Against whom Process of Outlawry may be awarded.

2. Of awarding Process of Outlawry against a *Feme Sole or Covert*, and the Proceedings thereon.

A woman is said to be waived, and not outlawed; and the reason, says my Lord Coke, why the outlawry of a woman is legally called *waivaria mulieris* is, because women are not sworn in leets or torns, as men are, who are above the age of twelve; and therefore, says he, men are called *ullagati*, i. e. *extra legem positi*; but women are *waiviatæ*, i. e. *derelictæ*, left out or not regarded, because they are not sworn to the law.

Co. Lit. 122 b; Lit. § 186; [Bract. 125.]

Therefore, where a *capias* and exigent were awarded against three men and two women, and the return was *ullagati existunt*, where, as to the women, it ought to have been *waiviatæ existunt*, this was held to be error.

Cro. Ja. 358, Middleton's case; Roll. Rep. 407, S. P.; Roll. Abr. 804, S. P.

If, in an action against husband and wife, the husband is outlawed and wife waived, and she is taken upon the *capias ullagati*, though she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone,) yet she still remains waived, and when her husband is taken he must bring her in.

For this, vide Dyer, 271 b; Cro. Ja. 445; Cro. Eliz. 370; Hut. 86; Sid. 21.

In an action for a debt due by a wife before marriage, the husband was returned outlawed and the wife waived; but before the return of the exigent, an attorney procured for the wife a *supersedeas*, surmising, that the wife had appeared by him as her attorney; on motion that this appearance of the wife should be received, all the court conceived, that if upon the exigent the sheriff had returned *reddidit se*, or upon *pluries capias* had returned *cepi corpus* for the wife, then her appearance should be entered, but not by attorney, as it is here; and the exigent should only issue against the husband, *et idem dies* should be given to the wife. But, when the husband upon the exigent is returned outlawed, then it shall be entered *aler sans jour* for the wife, for the process is determined; and if he will purchase his pardon he shall not have any allowance thereupon in a *scire facias*, unless he appear for himself and his wife. But if for the husband the sheriff should return *cepi corpus* upon a *pluries capias*, and a *non est inventa* for the wife, yet an exigent shall issue against both, because it must be presumed the husband might bring in his wife; but if upon the exigent the sheriff returned *reddidit se* for the husband, and for the wife that she is waived, the husband shall go *sine die*; but in this case, because the exigent was returned against both to be outlawed, the *supersedeas* supposing the appearance of the wife is merely idle and void; whereupon it was disallowed, and the exigent appointed to be filed against both.

Cro. Car. 58, 59, Smith v. Ash et ux.; Hut. 86, S. C.

4. Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.

If two are sued in a joint action and neither of them will appear, process of outlawry must be taken out against both.

Cro. Eliz. 648, Beverley v. Beverley.

If an exigent is awarded against two, and the return is *primo exacti fuerunt et non comparuerunt*, without saying *nec eorum aliquis comparuit*, it is erroneous.

2 Roll. Abr. 802; Taverner's case, 2 Hal. Hist. P. C. 204; S. C. cited, and S. P.



(C) Against whom Process of Outlawry may be awarded.

said to have been often adjudged. Cro. Ja. 358, S. P. adjudged, and said to be manifest error. 3 Mod. 89, 90, S. P. adjudged; Roll. R. 406; Palm. 388, S. P. adjudged.

If two in a writ of account are adjudged to account, and one is after (a) outlawed in the suit, and the other appears, he shall account alone.

41 E. 3, 3 Roll. Abr. 127, S. C.; Brownl. 25, S. C. said. (a) But if sued by bill upon which no outlawry can be, what proceeding shall be, *quære*; and vide Sid. 159; Keb. 577. [In such case the plaintiff must discontinue, and take out an original, on which he will proceed to outlawry against the one, after which he may go on in the action against the other. Edwards v. Carter, 1 Stra. 473; Symonds v. Parminter, 2 Stra. 1269; 1 Wils. 78; 1 Bl. R. 20. In an action upon a contract, if the defendant plead that the promise was made by another jointly with him, the plaintiff cannot reply that such other person is out of the kingdom, and that it is not possible to summon or attach him, but must proceed to outlawry. Sheppard v. Baillie, 6 Term R. 327;] [Goldsmith v. Levy, 4 Taunt. 299.]

When two are adjudged to account, and one is outlawed and accounts, if he discharges himself upon the account, this shall be a discharge to the other when he sues a *scire facias* upon a charter of pardon; and if he be charged by the account, this shall be a charge upon the other, because they are judged to account jointly.

41 E. 3, 13 b; Roll. Abr. 127; and vide Moor, 188; 2 Leon. 76.

If in debt due upon an obligation against B and C, sons and heirs of the obligor, and against D the daughter and heir of A, who was another of the sons and heirs of the obligor in gavelkind, process is continued till the uncles are outlawed, and the niece waived; and after the uncles are pardoned, and bring a *scire facias* against the plaintiff, who thereupon declares against them *simul cum* the niece; and the uncles plead, their niece is but of the age of seven, *unde non intendunt quod durante minori etate sua* they ought to answer, &c., yet the parol shall not demur; for the niece is out of court, and *quoad* her the original is determined, and at her full age no re-summmons could be sued against her, but the uncles only, because she never appeared in court.

Dyer, 239, pl. 203; Hawtrey v. Anger, N. Bendl. 148, pl. 205; Moor, 74, pl. 203; and And. 10, S. C. adjudged.

An action of trespass was brought against two; one was outlawed; after the entry of the writ it was entered, *et sciendum est quoad prædict.* J S (one of the defendants) *utlagat. est*, and then counts against one of them; on motion in arrest of judgment, the court held the declaration naught, and the course of pleading in such cases, after the entry of the writ, was to say *et quod prædict. J S utlagat. est in breve illo*; and that the last words are essential, because that he might be outlawed in another writ, and not in this. (b)

Sid. 175; Keb. 642, S. C. Guy v. Barnard. [(b) The same point was determined on demurrer in Sanderson v. Hudson, 3 East, 144; but see Co. Lit. 128 b, 352 b. If the outlawry is alleged to be *in that suit*, it is not necessary to add a *prout patet per recordum*. Macmichael v. Johnson, 7 East, 50. But the process against each defendant must be connected with the same original, otherwise the court will set aside the declaration for irregularity. Haigh v. Conway, 15 East, 1; *sed* vide Gent v. Abbott, 2 Moo. R. 87. The court will not set aside the declaration at the instance of the defendant, who is in court, on the ground of irregularity in the outlawry of the other defendant, who is not before the court. Solly v. Forbes, 2 Moo. 90. In an action on a joint contract against three defendants, two of whom are outlawed, the third, who pleads the general issue, may take advantage of a misnomer of his companions in stating the contract; for the contract remains joint, notwithstanding the outlawry, and it is a variance in description. Gordon v. Austin, 4 Term R. 611. Where one defendant is outlawed, and the other dies before final judgment, the action survives against the outlaw, and the plaintiff cannot have a *scire facias* against the representative of the deceased defendant. Fort v. Oliver, 1 Maul. & S. 217.]

(C) Against whom Process of Outlawry may be awarded.

5. *Of awarding Process of Outlawry against Principal and Accessory.*

Herein we must first take notice, that by the statute of West. 1, 3 Ed. 1, c. 14, it is recited, "That it had been used in some counties to outlaw persons being appealed of commandment, force, aid or receipt, within the same time that he which is appealed for the deed is outlawed; and thereupon it is provided, that none be outlawed upon appeal of commandment, force, aid, or receipt, unless he that is appealed of the deed be attainted, so that one like law be used therein through the realm; nevertheless, he that will so appeal, shall not by reason of this intermit or leave off to commence his appeal at the next county against them, no more than against their principals which he appealed of the deed, but their exigent shall remain until such as be appealed of the deed be attainted of outlawry, or otherwise."

In the construction of this statute the following particulars are laid down by Serjeant Hawkins as most remarkable.

1st, That it seems agreed that it extends as well to indictments as to appeals, not only because the word *appeal* in the statute may in a large sense be taken for an accusation in general; but because indictments are certainly as much within the reason of the statute as appeals; and the common law, for the settling whereof this statute was made, did not make any distinction in this respect between appeals and indictments.

2 Inst. 183; 2 Hawk. P. C. c. 27, § 129.

2dly, That it seems to be agreed, that wherever some of the defendants are expressly charged as principals, and others as accessories, before the award of this exigent, the outlawry thereon of those charged as accessories cannot but be reversible, because it appears upon the record that the exigent issued contrary to the direction of the statute. But if several be outlawed on a writ of appeal, which chargeth them all alike without any distinction, there can be no advantage taken of the appellant's not having pursued the statute, since it appears not but that he might have charged them all as principals.

2 Hawk. P. C. c. 27, § 130; 2 Hal. Hist. P. C. 200.

3dly, That it is strongly holden, that if an appellant take out the exigent at the same time against all the defendants, he must, when they appear, count against them all as principals; and shall be concluded from charging any of them as accessories, because he has taken out such process as is erroneous where all are not principals. But he makes a doubt, whether this be law at this day, since all errors, as the law seems now to be holden, are salved by appearance.

2 Hawk. P. C. c. 27, § 131; and vide 2 Hal. Hist. P. C. 200.

4thly, That it seems the better opinion, that where there are more than one principal the exigent shall not issue till all of them are arraigned: And herein it is said by Hale, that if A and B be indicted as principals in felony, and C as accessory to them both, the exigent against the accessory shall stay till both be attainted by outlawry or plea; for that it is said, if one be acquitted, the accessory is discharged, because indicted as accessory to both, and therefore shall not be put to answer till both be attaint. But hereof he adds a *dubitatur*, because, though C be accessory to both, he might have been indicted as accessory to one, because the felonies are in law several; but if he be indicted as accessory to both, he must be proved so.

2 Hawk. P. C. c. 27, § 132; 2 Hal. Hist. P. C. 200, 201.

(D) What Forfeitures an Outlawry subjects the Parties to.

In treason all are principals; and therefore process of outlawry may go against him that receives, at the same time as against him that did the fact.

Hal. Hist. P. C. 238.

(D) What Forfeitures and Disabilities an Outlawry subjects the Parties to: And herein,

1. *Where it is of the same Effect with a Sentence or Judgment.*

If a man be outlawed of treason or felony, though there be no other judgment (a) but *utlagatus est per judicium coronatorum*, yet it is of itself an attainder, and subjects the party to such an award thereupon, to be made by the court where he is brought, as is suitable to the offence for which he is indicted and outlawed.

2 Hal. Hist. P. C. 399. (a) Whether the outlawry appear by the sheriff's return of the exigent, or by the coroner's return of a *certiorari* to them directed, to certify whether the party were outlawed or not, the party is as much attainted, and shall forfeit and lose as much as if sentence had been given against him upon verdict or confession. 2 Hawk. P. C. c. 48, § 22; *sed vide* 2 Hal. Hist. P. C. 205, 206.—That those malefactors who wilfully fly from justice add a new crime to their former offence, and therefore ought to have no benefit of the law. 3 Mod. 72.

But if such outlawry appear to the court to be erroneous, thereof any one as *amicus curiæ* may inform them, the party shall have counsel assigned him to take advantage of the error. But if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only, and not void, the proper execution shall be awarded against him, but no sentence pronounced; because the outlawry is a judgment, and no man shall have two judgments for one offence.

2 Hawk. P. C. c. 28, § 23.

And herein it is said by Hale, that though the court *ex officio* is to prefix the party a day to purchase a writ of error, and in the mean time to respite execution; yet that must be on his alleging error in fact, or error in law upon the outlawry; for if the court be satisfied that it is merely a pretence, they may choose whether they will allow him a day to sue forth a writ of error, but may award execution presently.

2 Hal. Hist. P. C. 408.

But though an outlawry be an attainder, and equal to a conviction or sentence by verdict or confession, yet it does not subject the party to any severer punishment than the crime does for which the outlawry was pronounced; and therefore, if it be in such a crime for which clergy is allowable, the party outlawed shall be allowed his clergy in the same manner as he who is convicted by verdict or confession.

2 Hawk. P. C. c. 33, § 27; Hal. Hist. P. C. 521; 2 Hal. Hist. P. C. 350.

One was outlawed upon an information for seducing a young gentleman to marry a young woman of a lewd character, and fined 5000l. It was moved in behalf of the defendant, that he could not be fined upon the outlawry; because in misdemeanors the outlawry does not enure as a conviction for the offence, as it does in cases of treason and felony, but as a conviction for the contempt in not answering, which contempt is punished by the forfeiture of his goods and chattels; and if he might be fined now, he must be fined again upon the principal judgment. And the first was held to be irregular; and that the outlawry in these cases is not a conviction, as appears by Fleta, *quamvis quis pro contumaciâ et fugâ utlagatur, non propter hoc convictus est de facto principali*.

2 Salk. 494, pl. 1, The King v. Tippin.

## (D) What Forfeitures an Outlawry subjects the Parties to.

2. *Of the Forfeiture as to Lands, Goods, &c. ; and herein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose suit the Outlawry was had : And herein,*

## 1. Of the Difference between a Forfeiture in a Criminal and Civil Case.

Herein we must observe, that an outlawry of treason or felony is a conviction and attainder of the offence wherewith the party is charged ; and such outlawry corrupts the blood, and causes an absolute forfeiture of the party's estate both real and personal, viz. : in case of outlawry of treason, his lands are forfeited to the king of whomsoever they are holden ; and in case of outlawry of felony, to the lord by escheat of whom they are immediately holden.

9 H. 6, 20 ; 2 Roll. Abr. 85 ; Staunf. Pre. 47 ; Co. Lit. 128 ; 3 Hal. Hist. P. C. 295.

Also in civil cases, the retiring from the inquiries of justice is held so criminal in the eye of the law, that it is punished with the loss of the offender's goods and chattels, and the issues and profits of his real estate ; but by outlawries in civil cases the king has no estate, but only a pernancy of the profits ; nor can he manure or sow the ground ; and his interest continues no longer than the party hath an estate, and determines with the party's death ; and being originally introduced to compel the defendant to come in the sooner and answer the plaintiff's demand, may more easily be superseded or reversed, and thereby the king's pernancy of the profits discharged, than an outlawry in a capital case.

Plow. 541 ; 5 Co. 110 ; Show. Par. Ca. 73 ; and vide the authorities *supra*.

Also if a person make default till the award of an exigent either upon an appeal or indictment of a capital offence, he forfeits his goods, unless he was pardoned before the exigent was awarded. And it is holden, that the law is the same, as to such a default upon an indictment of petit larceny, and that wherever goods are so forfeited, they are not saved by an acquittal at the trial ; but by a reversal of the award of the exigent they are saved, whether such reversal be for an error either in fact or in law ; as for the imprisonment of the defendant at the time when the exigent was awarded, or for a defect in the indictment, appeal, or process.

Staunf. Pre. 47, 183 ; Roll. Abr. 793 ; Cro. Eliz. 472 ; 5 Co. 110 ; Co. Lit. 259 ; Cro. Ja. 464.

## 2. What Things are forfeited by the Outlawry.

Outlawry in a capital case being, as hath been said, an attainder and conviction, it is clear that all lands of inheritance, as all other the real and personal estate whereof the party outlawed is seised or possessed in his own right, are forfeited absolutely.

For which vide tit. *Forfeiture*.

Also, the king hath by the common law such a power to require his subjects to answer all demands of law and justice, that the non-appearance on process in a civil action is such a contempt that the party guilty is put out of the law, forfeits his goods and chattels, his leases for years, (a) and his trust in such leases, and the profits of his lands of freehold.

Salk. 109 ; 5 Mod. 114. (a) If the outlaw die before his term is sold by a *venditioni exponas*, the Court of Exchequer will let the widow in to plead this matter against a purchaser. *Watts v. Robinson*, Bunb. 220.

But outlawry in trespass, or any civil action, works no corruption of blood ;

(D) What Forfeitures an Outlawry subjects the Parties to.

and therefore, if the husband be outlawed in any such action, the wife shall notwithstanding have dower, and the issue shall inherit; for it is a forfeiture of the issues and profits of the lands (a) only during the life of the party outlawed, and so long as the outlawry remains unreversed. Also, it seems, that if the wife herself be outlawed or waived in any such action, yet her dower is not forfeited.

Bro. tit. *Outl.* 82; Perk. § 388; Co. Lit. 31 a. [(a) But of copyhold lands belonging to the outlaw the king is not entitled, even to the profits, by reason of the prejudice which would accrue thereby to the lord, who hath not committed any offence, and therefore shall not lose his customs or services. *Rex v. Budd, Parker*, 190; *Seliard v. Ev-erard, Owen*, 37.]

It is said to have been agreed by the whole court that arrearages of rent reserved upon an estate for life are not forfeited by outlawry, because they are real, and no (b) remedy for them but by distress: otherwise, if upon a lease for years.

Hedl. 164. (b) For this vide tit. *Rents*.

Also it is held that there are other things of the party outlawed which are forfeited to the king; and that therefore an executor or administrator cannot plead in excuse of assets that his testator or intestate was outlawed, because he might have debts (c) due upon contract: so goods taken for trespass before the outlawry, for which he may have trespass, and recover the value of the goods, which shall be assets in his hands.

Cro. Eliz. 851; Hut. 53; and vide 4 Co. 93 a; 2 Roll. Abr. 806; Cro. Eliz. 203. (c) That debtors may pay debts to the executor or administrator of a person outlawed, and their release shall be a good discharge to them, though the executors shall be accountable to the king for them. Hut. 54.

So, if the testator had mortgaged his lands upon condition that if the mortgagee pay not at such a day to him, his executors or his heirs, 100*l.*, that then it shall be lawful for him or his heirs to re-enter; and after, but before the day, the testator is outlawed and makes his executor, and dies, and at the day the mortgagee pays the money to the executors; this is assets, and not forfeited to the king.

Hut. 53.

If tenant for term of years be outlawed, the term is forfeited to the king, and he may seize it and use it at his pleasure.

9 H. 6, 21; 2 Roll. Abr. 806.

So if A, being possessed of a lease for years, grant it over to Bin trust for himself, and afterwards is outlawed in a personal action, this trust shall be forfeited to the king.

2 Roll. Abr. 807.

If tenant at (d) will sows the land, and afterwards is outlawed, the king shall have the corn.

9 H. 6, 21; 2 Roll. Abr. 806. (d) If a man leases at will, and the lessee sows the land, and the lessor is outlawed, the king shall not have the corn, and can have only the rent; for he is entitled to no more than the lessor himself. 5 Co. 116.

If the conusee of a statute-staple takes the conusor in execution upon the statute, and afterwards is outlawed in a personal action, the debt shall be forfeited to the king, and the king may discharge the conusor out of execution.

2 Roll. Abr. 807, *North v. Fines*.

So if there are two conusees of a statute, and they take the body of the

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conusor in execution, and one of the conusees is outlawed in a personal action, it is said to be a forfeiture of the debt against both.

2 Roll. Abr. 808.

If a man be outlawed on a personal action, the king shall present to his churches, although he hath a freehold or inheritance in them.

22 Ass. 33; 2 Roll. Abr. 708, S. C.

So if a person outlawed hath an advowson, that happens to become void (a) during the time the outlawry is in force, such avoidance is forfeited to the king, whether the outlawry were in a capital case, an action of trespass, or other personal action.

2 Roll. Abr. 807. (a) If after the outlawry the party purchaseth any more goods, the property is immediately vested in the king. Carth. 442.

If pending *quare impedit* brought by A, he is outlawed, and judgment is given for him in the *quare impedit*, and thereupon the incumbent resigns, and takes a new presentation from the queen by virtue of the outlawry, and accordingly he is instituted and inducted, and afterwards A reverseth the outlawry, and brings a *scire facias* to have execution of the judgment; though the presentation was vested in the queen, and executed before the outlawry reversed, yet A shall have execution of his judgment; for upon a recovery in a *quare impedit*, any incumbent that cometh in *pendente placito* shall be removed.

Beverley v. Cornwall, Cro. Eliz. 44; And. 148; Moor, 569; Savil, 89; Goulds. 103; Owen, 3, S. C. Vide post, (H. 2.)

Things personal, settled by way of trust on the offender, are as much forfeited as if he had the legal interest, or were in possession of them; as if a bond be taken in another's name, in trust for a person who is afterwards outlawed, this is forfeited in the same (b) manner as if taken in his own name.

Hob. 214; Cro. Ja. 512. (b) And shall be executed by an information in the Exchequer-chamber, or in Chancery. Hal. Hist. P. C. 248.

So the trust of a term granted by a man for the use of himself, his wife and children, &c., is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture: but it shall be forfeited no far only as is reserved for the benefit of the party himself, if made *bond fide*, whether before or after marriage for good consideration, without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court, where it is not expressly found.

Lane. 54, 113; Mod. 16, 38; 2 Keb. 564, 608, 644, 763, 772; Lev. 279; Hard. 496; And. 294; Raym. 120; 2 Roll. Abr. 34; Roll. Abr. 343; March, 45, 88; Sid. 260; Keb. 209.

So where upon an indictment of recusancy, the party, intending to go beyond sea, made a deed of gift of all his goods and chattels upon some feigned consideration, and then he went out of the realm, and was afterwards outlawed on the same indictment; it was adjudged, that the deed of gift was void to defeat the queen of the forfeiture of the goods, and this by the statute of 13 Eliz. c. 5, and that the queen was entitled to his leases and profits by the forfeiture.

11 Co. 20; Pannecok v. Blunt, cited in Twine's case; and vide Dyer, 295 a.

The forfeiture, as hath been said, must be of goods which the party has in his own right, and not the right of another; and therefore an executor or administrator outlawed forfeit nothing which they have in right of their testator or intestate.

11 Co. 21, 22; Cro. Eliz. 575, 851; 2 Roll. Abr. 806; Cro. Car. 556. (c) So, a

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term limited to executors, and not vested in the party himself, is not forfeitable. 2 Leon. 5, 6; And. 19; Moor, 100; Dyer, 309.

So if an executor recovers in account against the receiver of the testator, and afterwards is outlawed, yet he shall not forfeit this debt; for it continues the debt of the testator, and is only put in certainty by the judgment.

20 H. 6, 8 b; 2 Roll. Abr. 806.

Debts and duties upon simple contract are forfeited to the king by the outlawry of the party, though the debtor might have waged his law on such contract on an action brought by the creditor; of which privilege he is deprived by the outlawry.

4 Co. 95, Slade's case.

It hath been adjudged, that the cattle of a stranger (*a*) *levant and couchant* on lands extended on an outlawry, may be taken for the king upon a *levari facias* as the issues and profits of the lands; for that otherwise there might be no issues at all, or the person outlawed may take in other men's cattle to agist, and so defeat the outlawry.

*Britton v. Cole*, Carth. 441; *Salk.* 395, 408, S. C.; *Ld. Raym.* 305, S. C.; *Skin.* 617, S. C.; 5 Mod. 112, S. C.; *Comb. R.* 51, S. C. (*a*) That it is necessary to aver that the cattle were *levant* and *couchant*. Carth. 442.

So if the person outlawed should after the inquisition make a feoffment of his lands, the cattle of the feoffee may be taken for the issues of those lands, for the land is (*b*) debtor the king.

Carth. 442, *per cur.* (*b*) But if tenant for life is outlawed, and dies, *qu.* Whether the issues can be extended on the reversioner? Carth. 442.

But if the owner of the soil is outlawed, the cattle of a commoner cannot be taken as issues: however, if they should be taken, he must plead his title in the Exchequer, unless his right of common is found by inquisition on the outlawry.

Carth. 442.

[Upon a seizure of goods of an outlaw in a civil suit, the landlord is entitled, under the statute 8 Ann. c. 14, to be satisfied one year's rent out of the money in the sheriff's hands. || Because a *capias ullagatum* at the suit of the party is considered only as a private execution. ||

8 Ann. c. 14; *Graves v. d'Acastro*, Bunb. 194.]

|| And where a sheriff's officer was in possession of a tenant's goods, under a *capias ullagatum* in a civil suit, and the landlord employed the same officer to make a distress for the rent, which the officer did, and sold the goods, and received the produce; and the outlawry was afterwards reversed: it was held, that the landlord might recover the produce as money had and received by the officer.

*St. John's Coll. v. Murcott*, 7 Term R. 259. ||

### 3. To what Time the Forfeiture shall relate.

If a man be outlawed upon an indictment of felony and treason, and pending the process he alien the land, yet the king or lord shall have the land which he held at the time of the treason or felony committed; for the indictment contains the year and day when it was done, unto which the attainder by outlawry relates. But if a man sue an appeal by writ of felony or murder, and pending it the party alien, and then is outlawed before appearance, the lord's escheat is lost, because it relates only to the time of the

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From these cases the law seems to be now settled, as laid down in Salk., viz., That by a bare outlawry the party immediately forfeits his personal goods, and they are vested in the king, but that he does not forfeit the profits of his lands, nor chattels real, till inquisition taken; and that therefore an alienation after outlawry, and before inquisition, is good to bar the king of the pernamcy; but if he makes a feoffment after inquisition, the feoffee has the estate, and the king shall have the profits.

Salk. 395; Carth. 442, S. C. And that if a person outlawed do alien his lands before any inquisition taken for the king, which he may lawfully do, yet the alienee must plead off the extent in the Exchequer, by showing his title precedent.

[As to the preference upon outlawries, the following differences were stated by Parker, C. B., as settled in Easter term, 11 W. 3, 1699. First, Where there are two outlawries at different times, the first inquisition shall prevail: this was Bradnell's case, Mich. 36 Car. 2. Secondly, Where there are two outlawries on one day, the first inquisition shall be preferred: this was Pain and Dew's case, East, 21 Car. 2. Thirdly, Where there are two inquisitions on one day, the first outlawry shall be preferred. And, fourthly, Where there are two outlawries on one day, and both inquisitions on one day, there the first lease shall be preferred.]

4. Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.

When the outlawry is returned on the *exigi facias* by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either general, to arrest the body, or special, to arrest the body and extend the goods and lands, as also debts and *choses in action* belonging to the party outlawed; and when such inquisition is returned by the sheriff, transcript of the outlawry and inquisition is transmitted into the Exchequer: and thereupon, if any debt be returned due from any one to the outlawed, on application to the Exchequer, a *scire facias* issues to such person, to show cause why the king should not have such sum so found due on the inquisition to the outlawed. And the reason of returning the transcript of the record into the Exchequer is, *ad ulterior. execution. predicto domino reg. per eand. Cur. de Stucc. superinde fiend.*: for when the inquisition has returned the outlawed to be possessed of any goods or lands, the property of those goods belongs to the king, since the outlaw, being out of the king's protection, cannot enjoy any thing, and the profits of the land are to be seized into the king's hands; but the lands themselves are not forfeited, unless it be in capital cases; in other cases, the profits are seized whilst the party continues outlawed; and therefore the transcript of this record is sent into the Exchequer, that the court of ordinary revenue may have it in charge. But the Court of Exchequer (a) usually grants a *custodiam* to such person as sued out the outlawry.

Hard. 499; Carth. 441. (a) That the king is to satisfy the party at whose suit the outlawry was taken out; but this *per* Popham, C. J., is *de gratia* and not *de jure*, Volv. 19. [1 P. Wms. 690, S. C. cited in argument; 2 P. Wms. 269, S. P. And the court will not subject the property to the debt of the party, unless he obtain a grant of it under the Exchequer seal, and make the attorney-general a party. Balch v. Wastell, 1 P. Wms. 445; Rex v. Fowler, Bunb. 38; ——— v. Broomley, 2 P. Wms. 900.]

The king, by his prerogative, is to have *bona felonum et fugitivorum*; and (A) though the lord of a manor or other private person may claim them, yet that cannot be by prescription, but must be by way of grant; for every pre-



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scription must be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance.(c)

4 E. 3, 16; 5 Co. 109. (b) Outlawry in Northumberland for a debt in Durham, whether the king, or Bishop of Durham, he having a grant of *bona fugit*. in Durham, should have the goods. Vide Lane, 90, 91; 2 Roll. Abr. 808. [(c) Although they may not be claimed immediately by prescription, yet may they be had obliquely, or by a mean by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla preditorum, felonum, &c.* Co. Lit. 114 b. Durham is a county palatine by prescription. 4 Inst. 216.]

There is a difference said to be between an outlawry of mesne process and after judgment; that, as to the first, the party hath no interest, but that the whole benefit of the forfeiture accrues to the king.

Co. Lit. 288 b. Cro. Eliz. 707. But in 2 Lev. 50, it is held, that there is no difference between outlawries before and after judgment.

If a *capias ad satisfaciendum* issues upon a judgment in an action of debt, and the sheriff returns *non est inventus*, and after a *capias ullagatum* issues, upon which the party is taken and imprisoned, and he is let to go at large, the party that recovered may have an action of debt for this escape against the sheriff, because of the prejudice to him,(a) he being in execution as well for his benefit as for the king's.

Cro. Ja. 619; Moor and Sir George Reynolds, S. P. But by Bridg. 67, it appears to have been an action upon the case. [Throgmorton v. Church, 1 P. Wms. 693, S. P.; Leighton v. Walwin, 1 Roll. Abr. 800, 895; Cro. Eliz. 706, S. C., by the name of Leighton v. Garnous; 5 Co. 88, S. C.; Moor, 566, S. C.; Yelv. 20, S. C. cited; 5 Mod. 201, S. C. cited.] (a) Although the *capias ullagatum* issue after the year, so that the defendant could not be in execution without prayer, yet case lies; for the plaintiff was prejudiced by the escape; for he ought not to be discharged, till he found sureties to satisfy the plaintiff by the stat. 5 Edw. 3, c. 13; 5 Co. 89.

So if a *capias ullagatum* issues upon an outlawry upon mesne process, and the defendant is taken and suffered to escape, an action upon the case lies; because the plaintiff is thereby delayed of his debt.

Cro. Eliz. 652, Bonner v. Stokeley, adjudged. Moor, 641, pl. 882, S. P., adjudged. [Cooke v. Champness, Fitz. 265, S. P.; Stanton v. James, 1 Lutw. 110, S. P.]

If within the year a *capias ad satisfaciendum* issues on a judgment, and the defendant is thereupon outlawed, and two years after taken upon a *capias ullagatum*, and the sheriff suffers him to escape, debt will lie against him; for the defendant was in execution at the suit of the plaintiff, without prayer, inasmuch as the plaintiff was at the end of his process, and no continuance nor *scire facias* lay after the *capias ullagatum*, which, being sued at the charge of the plaintiff, imported an election of the body.

Wolf v. Davidson, 1 Salk. 381; 5 Mod. 200, S. C. adjudged; Comb. 373, S. C. adjudged; Comb. 373, S. C. adjourned; and Holt, C. J., said, he never understood the diversity taken in the case where within the year and where after. 1 Sid. 380, S. P., adjourned.

If A hath judgment in debt against B for 50*l.*, and thereupon he takes out a special *capias ullagatum* against him, and J S promises that, in consideration of his staying any further proceeding on that writ, he the said J S will satisfy him the debt, unless B do it before such a day; an *assumpsit* lies on this promise; for the plaintiff is at the charge of suing out the writ, and hath the carriage of it, and the party shall be in execution at his suit, and the king is to satisfy him out of the goods of the party outlawed; although it was

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objected, that the consideration was against law, being in delay of justice, and that the whole benefit accrued to the king.

Yelv. 19, *Jennings v. Hatley*, adjudged by three judges, *conft.* Popham.

But it hath been adjudged, that an action on the case will not lie against the sheriff for neglecting to extend or seize the goods and lands of a person outlawed upon a *capias ullagatum*, because it is the king's loss; and though it was urged, the sheriff's extending and seizing would be a means to enforce the defendant to appear to the plaintiff's action, this, the court said, was so remote, as not to be considered as a ground to support an action: but if it had been shown that the sheriff might have taken his body, and had neglected to do it, there might have been more reason to support the action.

Vent. 89, 90, *Dawson v. The Sheriffs of London*.

When after the extent the lands are leased out, or a *custodiam* granted to him at whose suit the outlawry was had, the lessee shall account only according to the extended value; and if they happen to be extended too low, the party hath no remedy but by taking out a *melius inquirend.*, and thereby having them extended at a greater value.

Hard. 106, *Marters v. Whitefield*.

If by the inquisition the lands of the person outlawed are found in the particular occupation of such and such persons, but the value of every particular parcel is not found, but by the lump that *in toto* the lands are of such a value, this is a good finding.

Hard. 6, 7, *Crosse's case*; and vide Hardw. 58, where it said, that such inquisition ought to be as certain as an indictment or declaration.

It was found by inquisition upon an outlawry, that the party outlawed was seised in fee *de sex clausis prati et pasturæ*; and it was objected, that the inquisition was void for uncertainty; *per* Hale, C. B., an inquisition found *de uno messuagio sive tenemento* has been held good; because it is not an office of entitling but of instruction or information, which does not require such precise certainty as an office of entitling does: so in an inquisition upon an extent upon a statute or judgment, or in dower, such certainties suffice, else all such inquisitions were liable to be quashed, which would annul all such proceedings; which would be mischievous; and such inquisitions have not used to be quashed for want of such precise certainty.

Hardw. 191, *Wilford v. Greaves*; [2 Salk. 469; Bunnb. 103.]

A bill was exhibited by the attorney-general against a person outlawed, to discover his real and personal estate, and what secret and fraudulent gifts and conveyances he had made, because by the outlawry his goods and the profits of his land were forfeited; to which the defendant demurred; *quia nemo tenetur prodere seipsum*, and to discover his estate upon a forfeiture; but the court held, that he ought to answer the bill; because the king is entitled to his estate by course of law, and the outlawry is in the nature of a gift to the king, or a judgment for him; and a common person may have a bill of discovery in the like case to entitle him to take out execution.

Hard. 99, *The Protector v. Lord Lumley*.

Also, in case of outlawry it is said to be the course of the Exchequer to prefer an information in nature of trover and conversion against him who hath the goods of a person outlawed.

Mod. 90.

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3. Of the Party's Disability to bring any Action.

A person outlawed cannot regularly maintain any action, for by this contumacy he is out of the king's protection, and shall have no privilege or (a) benefit from that law of which he is a violator, and to which he refuses to be amenable.

Lit. § 197; Co. Lit. 128. (a) But a person outlawed may be sued, being to his prejudice. Noy, 1; Sid. 60. *Ulagatus legem terræ amittit*. Glanvil, lib. 2, c. 3. *Respondra a toulis, mes nul respondra a luy*. Cro. Ja. 426, cited from Britton and Bracton.

This disability may be taken advantage of by pleading the same in bar or abatement, with this diversity, that it may be pleaded in abatement in all cases, but it cannot be pleaded in bar, unless the ground or (b) cause of the action be forfeited; as in felony, where it may be pleaded in bar to all actions concerning lands and tenements, as well as goods and chattels, because all are forfeited by the felony.

28 E. 3, 92; 22 Ass. pl. 47, 63; 5 Co. 109; Co. Lit. 29; 2 Ld. Raym. 1006. (b) If the demandant in a *cessavit* be outlawed in a personal action, this outlawry may be pleaded in bar of the action, because the arrearages are due to the king. 2 Inst. 298.

But, though it cannot be pleaded in bar, unless the ground or cause of action be forfeited, nor in actions where the damages are uncertain; yet, it is now held, that in actions on the case, where the debt to avoid the law-wager is turned into damages, there outlawry may be pleaded in bar; for it was vested in the king by the forfeiture, as a debt certain due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed.

Dyer, 227, in margin; 3 Leon. 197; Owen, 22; Cro. Eliz. 203; 2 Vent. 282; 3 Lev. 29.

It hath also been held, that outlawry may be pleaded in bar after it is pleaded in abatement, (c) because the thing is forfeited, and the plaintiff has no right to recover.

Jon. 239; Lutw. 1604. [(c) It is stated in Lutw. as having been so said in 11 H. 7, pl. 27. But no such dictum is to be met with in the place referred to. The decision in Jon. 239 was, that the defendant may plead outlawry in bar to a *scire facias* by the plaintiff after imparlance.]

The disability cannot be taken advantage of until the exigent be returned; for the inquiry after the party in the county is, in order that he may appear; and therefore, if he does appear at the return of the exigent, the law is satisfied, and the outlawry must not be recorded against him.

And. 36; Co. Lit. 128; Dyer, 317 a, pl. 6; 2 Roll. Abr. 805.

Also this disability is only pleadable when the plaintiff sues in his own right; for if he sues *en auter droit*, as executor, administrator, or as mayor with his commonalty, outlawry shall not disable him, because the person whom he represents has the privilege of the law, and outlawry being no objection to his representation, it is no objection but he should be answered.

Co. Lit. 128 a; Doct. Pl. 390.

But it hath been held, that to an information against a justice of peace, for refusing to grant his warrant to suppress a conventicle, outlawry in the informer is a good plea, though objected that he sues in right of the king; for as to a moiety he recovered to his own use, which he cannot do by reason of this disability.

2 Mod. 267; and vide 11 Co. 65; Hob. 327.

Again a relator in his information set forth, that he and the defendants were part-owners of several coal mines in Derbyshire; that the king had a

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duty of lot and cope out of all the lead-mines there; that by the custom, if one owner were at the expense of improving and working a mine, all the owners ought to contribute and bear their part of the charge; that the relator had been at great charges in making soughs and other things for working and improving the mines, without which they could not be wrought, and so the king would lose his duty; and that the defendant would not contribute nor pay any part of the charge; therefore to make him account with the relator, and pay his part of the charge, was (amongst other things) the scope of the information. To this the defendant pleaded an outlawry in the relator; and after much debate the plea was held good; for though the attorney-general be plaintiff, yet the relator is to have the whole benefit or loss of the suit, and is himself party to it, for it would abate by his death, &c.; and the king's name is only made use of by the form of the court, and he is not directly concerned at all, and very little by consequence, and the suit is not for the king's duty, but the relator's interest.

Preced. Chan. 13, Attorney-General of the Duchy at the relation of Mr. Vermuden v. Sir John Heath et al., in the Duchy-chamber, *coram* Ch. B. Atkins, and Ventris, J.; and vide 2 Bulstr. 134, which seems *cont.*; and vide And. 30. [The relator in this case seems to have sustained the character of plaintiff, as well as relator; for outlawry cannot be alleged in disability of a *mere* relator. Mitf. Eq. pl. 186.]

If there be two tenants in common of a rectory for years, and one of them be outlawed, yet the other, on setting forth this latter, may have an action of debt for a moiety.

Sid. 49.

If the party outlawed bring a writ of error to reverse the outlawry, the outlawry in that suit, or any stranger's, shall not disable him; for if he were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them: and if it be for error in the same outlawry, the outlawry itself is no objection, for that would be *exceptio ejusdem rei cujus petitur dissolutio*: nor is another outlawry pleadable in bar to such writ of error, for then two erroneous outlawries would be irreversible; which would amount to *exceptio ejusdem rei*, &c. So if there be an attaint brought on a verdict, outlawry grounded on that verdict shall not be pleadable in bar, for the above reasons.

Co Lit. 128; Raym. 46.

As this is a dilatory plea, when it is pleaded in another court than where the outlawry issued, the defendant must bring it in immediately; for this being in delay, if the court should give time, and it should not be brought in, delay of justice would be from the court; and since there is a way of having it immediately, by producing it under the great seal, no time shall be given to bring it (a) *sub pede sigilli*. But otherwise, when it is in the same court, for then the record is already in court.

10 Ass. 10; Doct. Pl. 396; 6 Co. 53; 5 Co. 88; 8 Co. 142. (a) That outlawry must be pleaded *sub pede sigilli*, otherwise the plaintiff may refuse it, but he shall not afterwards demur for that cause. Salk. 217.

In pleading outlawry in disability in another court, the ancient way was to have the record of the outlawry itself *sub pede sigilli* by *certiorari* and *mittimus*: but this being very expensive, it is now held to be sufficient to plead the *capias ullagatum* under the seal of the court from whence it issues; for as the issuing of the execution could not be without the judgment, the execution is a proof to the court that there is such a judgment; which again is a proof by matter of record of the defendant's plea of a matter of record,

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whereby it appears to the court not to be merely dilatory; and therefore on showing such execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in.

Co. Lit. 128; Doct. Pl. 392, 394.

Outlawry in a county palatine cannot be pleaded in any of the courts at Westminster, for the party is only ousted of his law within that jurisdiction; and it shall not extend to disable a man in another county where they have no power; for the county palatine being a royal jurisdiction within bounds, the losing of the privileges of the law within that jurisdiction can be no disadvantage to him in another county; and if he does not live within the palatine jurisdiction, he is not obliged to attend there. But it seems, that outlawry in the county palatine of Lancaster may be pleaded in the courts of Westminster; because that county was erected by act of parliament in Edward III.'s time; but Durham and Chester are by prescription.

Fitz. *Coron.* 233 a; 12 E. 4, 16; Doct. Pl. 396; Co. Lit. 128; 2 Roll. R. 38; Cro. Car. 566.

If outlawry be pleaded either in bar or abatement, and the plaintiff reply *nul tiel record*, and the defendant have a day given him to bring in the record, and in the interim the plaintiff remove the record by writ of error, and reverse it; though the defendant fail in bringing in the record, yet this shall not be fatal and peremptory on him; for, in the first case, he shall have liberty to plead a new bar; and in the second, the judgment shall only be a *respondeas ouster*; because his plea was a true plea at the time of pleading it, and the plaintiff was actually disabled from suing, not having then his *liberam legem*.

Doct. Pl. 397; 5 Co. 90; Moor, 73; Dyer, 228; Cro. Ja. 484; Salk. 339; 2 Roll. R. 58; Yelv. 36; 8 Co. 142; Brownl. 83.

So, that outlawry does not abate the writ, but is only a temporary impediment that disables a plaintiff from proceeding; for, upon obtaining a charter of pardon, or reversing the outlawry, he is restored to his law, and shall oblige the defendant to plead to the same writ.

Co. Lit. 128; Doct. Pl. 397.

*Audita querela* to avoid a statute upon the statute of usury; to which the defendant pleaded outlawry in the plaintiff at the suit of J S; on demurrer it was insisted that outlawry could not be pleaded in this case, the suit being only by way of discharge, and not to recover any thing; but it was held, that a person outlawed is not receivable to sue in any court, unless it be to reverse his own outlawry; and the chief justice said, that where the action is *ad lucrandum*, there ought to be ability in the person, and that it is all one to gain by way of discharge, as by way of perquisition.

Cro. Ja. 425, *Piers Griffith v. Hugh Middleton*.

But where error was brought by six to reverse a judgment in ejectment, and the defendant in error pleaded outlawry in one of the plaintiffs, the plea was held ill on demurrer; because this was only a commission which went in (a) discharge, and in which all the plaintiffs were obliged to join: it was also said in this case, that it would be very mischievous upon an outlawry in case of (b) error, attain, or *audita querela* which are only by way of discharge, if this should be any bar.

Cro. Ja. 616, *Bythal v. Harris*, adjudged by three Judges v. Houghton. (a) But it was agreed, that if two plaintiffs in debt be barred, and bring error, the outlawry against one is a good bar against the other, because they are to recover. Cro. Ja. 616. (b) But for this, vide Cro. Eliz. 648; 6 Co. 25; Cro. Ja. 171.

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A person is outlawed in debt, and taken upon a *capias* and committed to the Fleet; the keeper of the Fleet lets him escape voluntarily; and afterwards the executor of the plaintiff in debt takes him in execution again upon a new writ; and upon this second taking he brings an *audita querela*; to this outlawry in the plaintiff in the *audita querela* was pleaded; upon which plea he demurred; and it was resolved, that outlawry was a good plea in this case in disability of the plaintiff; because that this writ is not directly to reverse the outlawry, (as a writ of error is,) but is founded upon a wrong, viz.: upon the escape, and not upon the record only.

Sid. 43, Jason v. Kete.

In debt upon a judgment brought in Trinity term, the defendant imparled till Michaelmas term, and then pleaded in bar, that the plaintiff *die lune prox. post test. Sanct. Martini* was outlawed; to which the plaintiff demurred. It was urged, that the outlawry was mesne between the action brought and the plea pleaded, and that all matters in discharge of the action, which happen after the action brought, ought to be pleaded *puis darrein continuance*. But the court compared this to the common case of a judgment confessed by an executor after an action brought, which is never pleaded *puis darrein continuance*, but as this case is; and in these cases, the time of the outlawry, and the time of the judgment, and when it was, appear in themselves.

Salk. 178, pl. 3, Moor v. Green; 5 Mod. 11, S. C.

In pleading outlawry it hath been adjudged that the defendant must conclude his plea with a *prout patet per recordum*, and not *hoc paratus est verificare*.

3 Lev. 29.

If the defendant after imparlance pleads outlawry in bar, and the plaintiff replies *nul tiel record*, and the defendant hath a day to bring in the record, and fails therein, judgment shall be given absolutely against him, and not a *respondeas ouster*.

Cro. Car. 566, Dawson v. Lee.

If ten outlawries on mesne process be pleaded in disability of the plaintiff, this is naught for duplicity; for though there be a difference as to pleading double between pleas in bar and abatement, there is likewise a difference between a plea of an outlawry in disability and other pleas in abatement; and the court held this plea ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required.

Carth. 8, 9, Trevelian v. Succomb; Show. 80, S. C.

Outlawry may be pleaded to a bill in equity, as well as to an action at common law; and in this case the defendant need not set down the plea, as he must other pleas and demurrers, in eight days, or they must stand over-ruled; but the plaintiff must set it down, if there be any insufficiency in point of form in pleading; for being *sub pede sigilli* it appears, upon the showing of it, to be a good plea, and therefore not presumed to be necessary to be argued before the court. If an outlawry be not pleaded, yet it may be shown at the hearing as a peremptory matter against the plaintiff's demand, if it be personal; because it shows the right of the thing in demand to be in the king. If a plea of outlawry stand allowed, whereby the suit is put *sine die*, and after the outlawry be reversed, the plaintiff must bring his bill of

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revivor; because that suit being abated, the defendant has no day in court, and therefore must be brought into court by a new process.

This plea must be on oath. 2 Vern. 37. [But plea of an outlawry with the common averment of the identity of the person need not be on oath. Ibid. 198.]

But if the bill be for relief against an action at law, and an outlawry be pleaded by the defendant in the same action, it will not be allowed; (a) because the outlawry is part of the grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio*. Also, as at law, an outlawry in an executor, administrator, or guardian, is no good plea, because they do not claim in their own right; and the real actor being the testator or infant, the outlawry in any third person is no exception against him why he should not share in *judicio*.

(a) That to avoid pleas of outlawry, the plaintiff may make all that have outlawries against him defendants. 2 Vern. 109, *per* Hutchings, Ld. Commissioner.

|| A person outlawed cannot be heard to make a motion for his benefit in court—e. g. a motion to set aside an annuity.

Loukes v. Holbeach, 4 Bing. 419. ||

4. What further Disabilities Outlawry subjects the Party to.

Persons outlawed are under several other disabilities, besides that of bringing an action; such a one cannot be a juror, because he is not *liber et legalis homo*, as the law requires. (b)

Co. Lit. 6 b, and vide tit. *Juries*. || (b) Persons under outlawry are now expressly excluded from being jurors by 6 G. 4, c. 50, § 3. ||

But one outlawed in a personal action may be a witness though he cannot be a juror.

Vide tit. *Evidence*.

A person outlawed cannot be an (c) auditor to take accounts.

Co. Lit. 6 b. (c) But a person outlawed may be a private attorney. Co. Lit. 52 a. May be executor or administrator, vide tit. *Executors and Administrators*.—Incapable of executing an office in a corporation. Carth. 199; Show. 288. || The outlawry in this case was on an indictment for treason; and see Cro. Car. 147. ||

One outlawed in a personal action cannot be an approver; because by his outlawry he is out of the law, and his accusation shall not be of such credit as to put any person on his trial.

2 Hawk. P. C. c. 24, § 4.

If a man pledge goods and then is outlawed, he cannot redeem them; because then the absolute property of them is in the king; but if the outlawry be reversed, then the outlawed person is reinstated in his property as if there had been no outlawry, and therefore may redeem.

Bulst. 29.

Persons outlawed in debt, trespass, or other civil action, may be heirs.

Co. Lit. 8 b.

If a husband be outlawed in trespass, or any civil action, the wife shall have dower, for this works no corruption of blood, or forfeiture of lands; so likewise, it seems, if the wife be outlawed or waived in such actions, yet her (d) dower is not forfeited.

Brook, 82; Perk. 388; Co. Lit. 31 a. (d) So a husband shall be tenant by the courtesy though he be outlawed in a civil action. 5 Co. 110; Co. Lit. 92 b, 391 a.

A being outlawed, the queen granted him a lease for years, rendering rent; he was again outlawed after the grant, but before any seizure there

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Every *capias* ought to be returnable the ensuing term, for the mischief that might otherwise befall the prisoner in being kept always in prison.

But for this, Cro. Eliz. 467; Dyer, 175; Lev. 143.

The *capias utlagatum* can issue only in term-time, being a judicial writ; yet, in pleading an outlawry, the party need not allege that it issued in term-time; for it shall be so intended, unless the contrary appears.

Latch. 11; Lutw. 333.

[It need not indeed be stated in express terms on a record of a judgment of outlawry, that a writ of *capias* issued; for it is sufficient, if it appears "that the sheriff was commanded to take the defendant."

Rex v. Perry, 6 Term R. 573.

Neither is it necessary in stating every writ to repeat the day and year when each was issued: it will suffice, if it appear by reference to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed, *Whereupon* the exigent was awarded; *whereupon* referring to the day when the *capias* was returned.

Rex v. Perry, 6 Term R. 573.

It need not appear on a record of outlawry that the *capias* and exigent were sealed by the justices of oyer and terminer, &c.

Rex v. Yandell, 5 Term R. 521.]

If the process be against the feme, and the words are, *quas recuperavit versus eum*, instead of *eam*; this is (a) such an error for which the outlawry may be reversed.

Cro. Ja. 577. (a) So, an outlawry was reversed upon a writ of error, for that in the exigent it was fourteen in figures, and not in words. 2 Keb. 128. So where the year of the Lord was in figures, and not in words. Style, 334.—So where it was *ex insinuatione* for *ex insinuatione*, for want of *i* the outlawry was held to be erroneous. Cro. Ja. 577.

If the writ be *præcipimus vobis* instead of *præcipimus vobis*, this is erroneous; for without a command to the sheriff the writ is not good, and here, there is none; the word *præcipimus*, being senseless, is of no greater force than if omitted.

Style, 334.

## 3. Where for Variance, in such Processes, the Outlawry may be reversed.

If there be a variance between the original and extent or other process, for this the outlawry may be reversed.

Fitz. Ullagary, 41; Bro. Variance, 90, Misnomer, 80, Error, 172.

As, a variance between the original writ and filazer's rule.

2 Leon. 120.

So where in error to reverse an outlawry in trespass, in the original the plaintiff was named *Barnes*, and in the exigent *Bernes*; this was held error. So where in the original it was *Blaba sua*, and the exigent was *Blada*; this was held a plain variance, and the outlawry was reversed.

Cro. Eliz. 240, Elden v. Barnes.

So where in the original the party was named *Agnes Gargrave, of Kingsly in com. Ebor.*, and in the exigent she is named *nuper de Kingsly*; this was held error.

Cro. Ja. 576.

|| Where in an original writ the defendant was described as T B of Caller-



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ton in the county of Northumberland, and the error assigned was that T B was not, before or at the time of issuing the original writ, of or conversant in C aforesaid, and that there was not any town, hamlet, or place of the name of C in that county; and to this it was pleaded that plaintiff prosecuted his writ with intent to declare upon a bond of defendant, in which he was described as T B, of C, in the county of N; it was held by the court that this estopped the defendant from pleading that he was not of C, in the county of N, and the judgment of outlawry was affirmed.

Bonner v. Wilkinson, 5 Barn. & A. 682.]

4. Where, for a defective Execution and Return, the Outlawry may be reversed:  
And herein,

1. To whom such Process is to issue and be directed.

The exigent and several processes, in order to an outlawry, are to be directed to the sheriff of the proper county; and such care hath been taken that there might be no surprise in the affair, that in civil cases there are three several offices concerned in the issuing of such process: the first is the Chancery, out of which the original issues; the second, the filazer, who makes out the *capias*, *alias*, and *pluries*; and the third, the exigenter, who makes out the exigents; which several processes must be legally executed before the party can be said to be outlawed: therefore, if the sheriff returns a *cepi*, if he have not the body at the day, the court will not award an exigent on the suggestion of an escape, unless the sheriff will return one.

2 Hawk. P. C. c. 27, § 17.

If the exigent be directed to the sheriffs of the city of Lincoln, and the direction be *Quod capias corpus ejus ita quod habeas corpus ejus*, where (as it was objected) it ought to have been *capiatis et habeatis*; yet this is no error, for they are both but one officer to the court, and though in the end of the writ it was, *Ita quod habeatis ibi hoc breve*, this was likewise held to be good, and no way repugnant, being good both ways.

Cro. Ja. 576.

But if, in the direction of process of outlawry to the sheriffs of London, it be *precipimus tibi* instead of *vobis*; this is such an error for which the outlawry will be reversed, because that the court will *ex officio* take notice that there are two sheriffs in London.

Hetley, 93; Lit. Rep. 150, S. C.

Judgment of outlawry is given by the coroner at the fifth county-court, upon the party's not appearing to the exigent, (which is a writ, commanding the sheriff to cause the defendant to be demanded from county-court to county-court until he be outlawed, &c.,) and such judgment is entered thus, *Ideo, &c., per judicium coronatoris domini regis comitatûs prædicti. utlagatus est.*

Dyer, 223, pl. 24; Bro. Coron. 166; 3 Inst. 312.

If the judgment appear not by the return of the exigent to have been given by the coroner, it is erroneous, except in London, where the mayor by custom is coroner, and the judgment is given by the recorder.

Co. Lit. 288; Dyer, 317, pl. 6; 8 Co. 126; Cro. Eliz. 648; Palm. 43; Cro. Ja. 358, 531; Roll. R. 266.

If there be two coroners in a county, the calling upon the exigent may be by one of them, and likewise one alone may give the judgment of outlawry; but it seems the return must be by two in ministerial acts; the name of the

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coroner must be subscribed (*a*) to the judgment of outlawry at the *quinto exactus* upon an outlawry of felony; and it must be subscribed also by the name of their office, *A B et C D coronatores*, unless in London, where the mayor is coroner; the sheriff's name and the office must also be subscribed to the return of the exigent, *e. g. A B armiger vicecomes*.

2 Hal. Hist. P. C. 204. [(*a*) It is not necessary, that the names of the coroners should be subscribed to the judgment of outlawry; it is sufficient if it appear on the record, that the judgment of outlawry was given by them. *Rex v. Yandell*, 5 Term R. 541.]

If after the *quinto exactus* the coroners refuse to give judgment of outlawry, the court will grant an attachment against them; and it is said that the coroners of Stafford for such an offence were fined 10*l.*; but after the judgment of the outlawry pronounced, they may (*b*) stay the return of the exigent to be advised, if the case requires it.

Noy, 113. An attachment granted against the coroners of York. (*b*) That a *certiorari* lies to return the outlawry, which must be returned by the sheriff on the *exigi facias*, and such return recorded in the court above. *Dyer*, 223 a.

By the statute of 34 H. 8, c. 14, the clerks of the crown, clerks of assize, and clerks of the peace, are to certify into the King's Bench the names of all persons outlawed, attainted, or convicted; and upon letter from the justices aforesaid, certificates shall be made of such persons outlawed, attaint, or convict, to the justices of jail-delivery.

2 Hal. Hist. P. C. 36.

2. To what Place the Process is to issue; and herein of the *Quinto exactus*, and Proclamations on an Outlawry.

The exigent must be sued to the county where the party really resides, for there all actions were originally laid; and because that outlawries were at first only for treason, felony, or very enormous trespasses, the process was to be executed at the torn, which is the sheriff's criminal court; and this held not only before the sheriff but before the coroners, who were ancient conservators of the peace, being the best men in each county to preside with the sheriff in this court, and who pronounced the outlawry in the county court on the party's being *quinto exactus*; and therefore anciently there was no occasion for any process to any other county than that in which the party actually resided. But this matter being since altered, and the learning thereof depending on several acts of parliament, it will be unnecessary to take notice of the statutes themselves.

*Fitz. Exigent*, 26; *Dyer*, 295.

And first, it is enacted by the 6 H. 6, c. 1, "That before any exigents be awarded against persons indicted in the King's Bench of treason or felony, writs of *capias* shall be directed as well to the sheriffs or sheriff of the county wherein they be indicted as to the sheriff or sheriffs of the county whereof they be named in the indictments; the same *capias* having the space of six weeks at the least, or longer time, by the discretion of the said justices, if the case require it, before the return of the same; which writs so returned, the justices shall proceed in the manner as they had done before the statute; and if any exigent awarded, or any outlawry pronounced hereafter against any such persons before the return of the said writs, the same exigent so awarded, with the outlawry thereof pronounced, shall be void and holden for none."

And it is farther enacted by 8 H. 6, c. 10, "That upon every indictment or appeal by the which any subject dwelling in other counties than where

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such indictment or appeal shall be taken of treason, felony, and trespass, before the justices of the peace, or before any other having power to take such indictments or appeals, or other commissioners or justices in any county, franchise, or liberty of England, before any exigent awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county whereof he who is indicted is or was supposed to be conversant by the same indictment, returnable before the same justices, before whom he is indicted or appealed, at a certain day, containing the space of three months from the date of the said last writ, where the counties be holden from month to month, and where the counties be holden from six weeks to six weeks, the space of four months, until the day of the return of the said writ, by which writ of second *capias* the sheriff shall be commanded to take him which is so indicted or appealed, by his body, if he can be found within his bailiwick; and if he cannot be found within his bailiwick, to make proclamation in two counties before the return of the same writ that he which is so indicted or appealed shall appear before the said justices, &c., at the day contained in the said writ, to answer, &c., after which writ so served and returned, if he which is so indicted or appealed come not at the day of such writ returned, the exigent shall be awarded; and that every exigent and outlawry otherwise awarded or pronounced shall be holden for none and void."

But it is expressly provided, "That the above-recited statute concerning process to be made before the king in his bench stand in force, and that this present statute shall not extend to indictments or appeals taken within the county of Chester: and that if any persons shall be indicted or appealed of felony or treason, and at the time of the same felony or treason supposed were conversant within the county whereof the indictment or appeal makes mention, the like process to be made against them as was used before."

And it is farther enacted by 10 Hen. 6, c. 6, "That such second *capias* as is required by 8 Hen. 6, c. 10, shall be awarded upon indictments or appeals removed into the King's Bench, or elsewhere, by *certiorari* or otherwise."

And by the 31 Eliz. c. 3, it is enacted, "That in every action personal, wherein any writ of exigent shall be awarded out of any court, one writ of proclamation shall be awarded and made out of the same court having day of *teste* and return, as the said writ of exigent shall have directed and delivered of record to the sheriff of the county where the defendant, at the time of the exigent so awarded, shall be dwelling, which writ of proclamation shall contain the effect of the same action; and that the sheriff of the county, unto whom any such writ of proclamation shall be directed, shall make three proclamations in this form following, and not otherwise: that is to say, one of the same proclamations in the open county-court, and one other of the same proclamations to be made at the general quarter sessions of the peace in those parts where the party defendant at the time of the exigent awarded shall be dwelling; and one other of the same proclamations to be made one month at the least before the *quinto exactus* by virtue of the said writ of exigent, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the exigent so awarded; and if the defendant shall be dwelling out of any parish, then in such place, as aforesaid, of the parish in the same county, and next adjoining to the place of the defendant's dwelling, and upon a Sunday immediately after divine service and sermon, if any sermon there be, and if no sermon

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there be, then forthwith after divine service; and that all outlawries had and pronounced, and no writs of proclamations awarded and returned according to the form of this statute, shall be utterly void and of none effect."

[By statute 4 & 5 W. & M. c. 22, § 4, made perpetual by 7 & 8 W. 3, c. 36, § 4, it is enacted, "That upon the issuing of any exigent out of any of their majesties' courts, against any person or persons for any criminal matter, before judgment or conviction, there shall issue out a writ of proclamation, bearing the same test and return, to the sheriff or sheriffs of the county, city, or town corporate, where the person or persons in the record of the said proceedings is or are mentioned to be or inhabit, according to the form of the statute made in the one-and-thirtieth year of the reign of the late Queen Elizabeth, which writ of proclamation shall be delivered to the said sheriff or sheriffs three months before the return of the same."

*Note:* This statute extends the provisions of the 31 El. only to criminal cases *before* judgment: in those cases *after* judgment, no proclamations are necessary.]

In the construction of these statutes the following opinions have been holden:

That though the words are express, that any outlawry pronounced contrary to the directions of the statute shall be void; yet it is not to be taken as if such outlawries were absolutely void, but only voidable by writ of error.

(Cro. Eliz. 179; 2 Co. 59; Plow. 137; Hob. 166.

If a defendant be expressly named of the same county wherein he is indicted or appealed, and be also named under an *alias dictus* of another, it hath been adjudged, that there is no need of any *capias*, with a command for proclamation according to 8 H. 6, c. 10, because that which comes under the *alias dictus* in no way traversable nor material: Also, if a defendant be named of B and late of C, there is no need of any *capias* to the sheriff of the county wherein C lies; because that it appears, that the defendant is at present conversant at B. But if a defendant be named of no certain place at present, but only late of B, and late of C, and late of D, &c., being all of them in counties different from that in which the prosecution is commenced, a *capias* shall go to the sheriff of every one of these counties.

(1 Hawk. P. C. c. 27, § 126; 2 Hal. Hist. P. C. 195, 196.

On a writ of error to reverse an outlawry upon the statute of 5 Eliz. c. 9, of perjury, the first error assigned was, that the defendant was indicted by the name of *N. L. de parochia de Aldgate*, and not shown in what county Aldgate lies. Sdly, For that a county court was held 23 February, and the next county court was held 23 March following, so as there was not twenty-eight days between these two county courts, as there ought to be by the law, exclusive and not inclusive. And for the first cause it was reversed, although it was objected to be well enough because Middlesex was in the margin, so the parish should be intended to refer thereto; but because an indictment shall not be taken by intendment, and because the county in the margin shall be referred to the place where the offence was committed, and not to the indictment of the party; and by the statute of 8 H. 6, c. 10, there ought to be the addition of the place and county where the party indicted inhabits; therefore it was held to be ill, and reversed. For the second cause also, it was held to be erroneous; but Tanfield said that ought to be assigned as an

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error in *fail*, for it might be leap-year, and then it is good, and that matter issuable.

Cro. Ja. 167, Leech's case.

If an *exigi facias* be delivered to the sheriff, and there be but two county courts before the return, and the sheriff return the first and second *exactus*, *et non comparuit*, and that there were no more county days between the delivery of the writ to him and the day of the return, there may issue a special *exigi facias* with an *allocato comitatu*, if it be prayed after the return, and before any new county day be past; but if any county day be past between the last of the former county days and the return, no *exigi facias* shall issue with an *allocato comitatu*, but an *exigi facias de novo*; for the demand of the party must be at five county courts successively held one after another without any county court intervening: so, if after the second *exactus* the offender render himself, and find mainprize, and at the days of the return make default, no *exigi facias* with an *allocato comitatu* shall issue, because three county days intervened, but a new exigent and a *capias* against the bail.

2 Hal. Hist. P. C. 201, 203

And therefore it hath been holden, that in London, where the holding of the *hustings* is uncertain, no *exigi facias* shall issue with an *allocato hustings*, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county courts. But it is now agreed, that if an exigent issues in London, and they begin *hustings de placito terre*, (as they may,) they shall proceed along at that *hustings* to the outlawry, without mingling their *hustings de communibus placitis*; but if an *allocato husting* comes, they shall proceed without omitting any *husting*.

Palm. 287; 2 Leon. 14; 2 Hal. Hist. P. C. 202.

[If upon the record of the outlawry, in a criminal case *before* judgment, it appear from the writ of proclamation and return, that the party was outlawed after he had a day given to appear in court, and before the arrival of that day, this will be error. Thus, George Barrington was outlawed on the 21st of February, and the writ of proclamation required the sheriff to proclaim him, so that he should be before the justices of the peace at the general sessions of the peace, to be holden for the county aforesaid next after the first day of February next ensuing; and the return by the sheriff to that writ was, that he had proclaimed the said George Barrington that he should be before his majesty's justices of the general sessions of the peace last within mentioned. The next sessions of the peace were holden on the 25th of February; so that by the terms of the writ, and the proclamation too, the prisoner had a day given him to appear till the 25th of February; and if he had appeared on that day, he would have complied with the requisition of the writ, and have saved his default. But he was outlawed before that day came, viz., on the 21st of February; and upon that ground the court held the outlawry bad.

Barrington v. Regem, 2 Term R. 499.

But where it appeared by the writ of proclamation, and the return to it, that the prisoners were required to render themselves to the sheriffs, so that he might have their bodies before the justices, &c., at the return of the writ; it was adjudged to be good.

Yandell v. Regem, 5 Term R. 521.

If it appear upon the record, that the writ of proclamation was delivered

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to the sheriff three months before the return of it, it is sufficient, though it be not expressly so alleged. Ibid.

The sheriff need not allege in his return to the writ of proclamation, that "the persons proclaimed did not appear and render themselves;" though he must in his return to the exigent. Ibid.

A writ of proclamation requiring the sheriff to proclaim the parties *in open court in the sheriff's county*, (not saying *county court*,) is good. Ibid.]

|| Where the proclamations returned by the sheriff could not, by possibility, have been made between the day of issuing the writ and the day of the return, inasmuch as there was no county court, or general quarter sessions of the peace held, at which the defendant could have been proclaimed, while the writ was running, the court seemed to think that the proceedings were irregular.

3 Dow. & Ry. 55.]

## 3. What shall be said a good Execution and Return.

Before a person is pronounced outlawed he is to be *quinquies exactus*, for he hath three days for appearance, one for grace, and if he stand in contempt at all these days, at the fifth county court he is pronounced outlawed by the coroners; and therefore (a) if a person be outlawed the day of the *quinto exactus*, this is error, because he hath all day to appear.

(a) Cro. Ja. 660; Palm. 280, S. C.

But if an exigent is awarded against A, and after he is *quinto exactus*, and before the return of the exigent, he dies, yet the outlawry shall stand in its force, and shall not be reversed; for judgment was by the coroners upon the *quinto exactus*, and they may certify the outlawry: but otherwise, (b) if A had died before the *quinto exactus*.

Noy, 49, Hartland v. Yates. (b) If upon an indictment of murder an exigent be awarded, but before the return the party dies, his executors may, by writ of error setting forth the special matter, reverse the proceedings. 5 Co. 111 a, Eaton's case, cited in Foxley's case.—That an executor may reverse an outlawry. 2 Keb. 507.—That an heir or executor may. 2 Hawk. P. C. 461.—But a jailer or sheriff cannot take any advantage of an error in an outlawry. Dyer, 67 a; 3 Keb. 286.

If, on an outlawry against two, it be returned that *exacti non comparuerunt*, without saying *nec aliquis eorum comparuit*, this is erroneous; for peradventure one of them did appear.

Roll. Abr. 809, Clark's case; 2 Roll. R. 440, S. C. adjudged.

So, where a *capias*, and thereupon an exigent, was awarded against five, viz., three men and two women, and the return was, *Quod ad quartum comitatum, &c., non comparuerunt*, without saying *nec eorum aliquis comparuit*; this was held to be manifest error; and it being likewise returned *utlagati existunt*, where for the women it ought to have been *uariatæ*, this, likewise, was held to be error.

Cro. Ja. 368, Middleton's case.

[If one exigent be awarded against the principal and accessory together, it is error only as to the accessory.

Itax v. Vandell, 5 Term R. 521.]

The return must show where the county court was held, and in what county; and this must be shown on every *exactus*; and therefore (c) an outlawry was reversed, because the place where the county court was held was not shown on the *secund. exactus*; so (d) where not shown on the *tertio exactus*.

3 Hal. Hist. P. C. 203. (c) Style, 451. (d) Keb. 50.

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Also, the party must be named of such a place (a) *in com.* Midd., and not *de* Midd.

Cro. Ja. 616. (a) An outlawry in London was reversed upon a writ of error, because the hustings were set out to be held in, but not for the city. Trin. 6 G. 2, Martin v. Duckett.

If the sheriff returns, that *ad comitatum meum, S tent. apud C*, and says not *in com. præd.*, or *in com. S*, this is erroneous.

11 H. 7, 10 a; 2 Roll. Abr. 102; 2 Hal. Hist. P. C. 293.

So if it be *ad comitatum meum tentum apud S in com. Somers.*, and say not *ad comitatum meum Somers.*, or *ad comitatum Somers.*, without saying *ad comitatum meum Somerset*; this is erroneous.

2 Roll. Abr. 802; Palm. 480; Latch. 210.

So, an outlawry was reversed, for that the proclamations were returned to be *ad comitat. meum tent. apud*, such a place *in com. prædict.*, and not said *pro com.*; for anciently one sheriff had two or three counties, and might hold the court in one county for another.

Vent. 108; Show. 319; 3 Mod. 89; 2 Keb. 141; Comb. 19; 2 Show. 60, 68, pl. 52; Lev. 164. [From the authorities referred to in this and the two preceding paragraphs, and several others which the Court of King's Bench was furnished with, it was holden in Wilkes's case, that a technical form of words was requisite in the description of the county court, at which an outlaw is exacted; and therefore where, in that case, the sheriff stated that "at my county court," without adding "of Middlesex," and "held at the house known by the sign of the Three Tuns in Brook Street, near Holborn, in the County of Middlesex," without adding the words, "for the County of Middlesex," after the word "held," the outlawry was reversed. Rex v. Wilkes, 4 Burr. 2527.—In a later case, Buller, J., says, "I do not know, that it has ever been determined that in any return made by a sheriff any technical form of words is necessary: certain requisites must be observed; but if observed in substance, and the return be not in equivocal terms, a great deal of argument is necessary to convince me that such a return is bad." Barrington v. Regem, 2 Term R. 502. The inclination of the opinion of the court in this case of Barrington seems to have been, that a return to a *capias cum proclamatione*, that the prisoner was exacted, "at my county court, holden at the house known by the name of the Sheriff's Office in Took's Court, Cursitor Street, in and for the County of Middlesex," was well enough; though objected, that the name of the county was not added after "my county court," and that the county court was not stated to have been holden in Took's Court, Cursitor Street, and in and for the county of Middlesex. However, the clearness of the other objection made to the return in that case relieved the court from the necessity of giving an opinion upon this.—In Barrington's case, let it be observed, the outlawry was before judgment; in Wilkes's case, it was after conviction.]

The sheriff must return the day and year of the king to every *exactus*; and therefore if the day and year of the king be inserted in the 1st, 2d, 3d, and 5th *exactus*, but omitted in the 4th, it is erroneous, and shall not be supplied by intendment.

2 Roll. Abr. 802; 2 Hal. Hist. P. C. 203; [Rex v. Almon, 5 Term R. 202, S. P.]

So, if it be *anno regni dominæ reginæ*, without saying *Elizabethæ*, or *dominæ Elizabethæ*, without saying *reginæ*, or *anno regni domini regis Jacobi*, without saying *regni suæ Angliæ*, for the year of England and Scotland differ; so, if there be less than a month between the first and second *exactus*, in these cases the outlawry is erroneous.

2 Roll. Abr. 803; 2 Hal. Hist. P. C. 203.

So, if the return be *ad husting tent. apud Guildhall civitatis London*, without saying *de communibus placitis*, it is erroneous; because they have two hustings, one *de communibus placitis*, the other *de placitis terræ*.

2 Roll. Abr. 802; 2 Hal. Hist. P. C. 203.

If an outlawry be returned, that the party was *exact.* at three several times,

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10 Jac., and that he was *quarto exact*. 25th day of Feb. *et non comparuit*, without mentioning any year, *et quinto exact*. such a day in March, 10 Jac., although it may be intended that he was *quarto exact*. in 10 Jac., yet the outlawry shall not be good by intendment; for perhaps the clerk would have made it *quarto exact*. 8 Jac., which would have been clearly bad.

2 Roll. Abr. 803, Chapman's case.

(F) Of the manner of reversing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

OUTLAWRIES are, regularly, to be reversed by plea by writ of *identitate nominis*, or by writ of error, for any errors, be they errors in fact or in law. 2 Hal. Hist. P. C. 207.

As to errors in fact; as that in felony, the party was an infant under the age of fourteen, was in prison or beyond sea; these can, regularly, be only taken advantage of by writ of error. But it is agreed, that by the common law in *furoribus rite*, an outlawry of treason or felony might be avoided by plea that the defendant was in prison, or in the king's service beyond sea, &c., at the time of the outlawry pronounced against him; but that no outlawry for any other crime (against a party rightly described) can be avoided by plea of any matter of fact whatsoever.

Co. Lit. 359: 2 Hawk. P. C. c. 50. § 6.

As to avoiding an outlawry of felony because the party was beyond the sea, these differences are laid down by Rolle and Hale, as agreed to by the court: 1st. That if a man, having committed a felony, goes beyond the sea voluntarily, or upon his own occasions, and not in the king's service, before any exigent awarded, though after the indictment, and then an exigent is awarded, and the defendant beyond the sea is outlawed for the felony, he may assign it for error. 2dly, But if, after the exigent awarded upon the indictment of felony, he goes beyond the sea voluntarily, or upon his own occasions, and being so beyond sea is outlawed, he shall not avoid it by such being beyond sea: because, by the exigent awarded he has notice of the prosecution, and by such a means he may avoid his conviction, by staying till all the witnesses are dead. 3dly, But yet *prima facie* the error in that case is well assigned, by alleging he was *ultra mare tempore promulgationis a iudice*; and if he were in the realm after the exigent issued, it shall come in by the plea of the king's attorney to show it. 4thly, But if he were within the realm at the time of the exigent issued, and went beyond the sea upon the service of the king or kingdom, and then is outlawed, being beyond the sea, this outlawry shall be reversed; if the party allege generally that he was *ultra mare tempore promulgationis utlagariæ*, and the king's attorney reply that he was in England *tempore emanationis brevis de exigi facias*, it is a good defence for the plaintiff in the writ of error, to allege that he went out after the exigent, and before the outlawry pronounced, upon the king's command or service, and show it specially, and so confess and avoid the plea.

2 Roll. Abr. 804: 2 Hal. Hist. P. C. 208.

When, in error to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exigi facias*, the plaintiff in error was beyond seas, and defendant pleaded, that before the awarding and issuing of the writ *exigi facias*, plaintiff in error of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of Eng-



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land, and of his fraud and covin voluntarily remained in parts beyond the seas until after the outlawry, whereupon issue was joined, and found for the defendant; the court held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error, *non obstante veredicto*.

Bryan v. Wagstaff, 5 Barn. & C. 314; 8 Dow. & Ry. 208, S. C.; Ry. & Moo. 327, S. C.

So also, the Court of Common Pleas reversed the outlawry, though it was sworn the defendant went beyond sea in order to avoid the process.

Hesse v. Wood, 4 Taunt. 691; but see 2 Car. and P. 125, 129, 132.

And on a writ of error to reverse an outlawry, issue being joined on an assignment that the outlaw was beyond sea at the time of suing out the writ of *exigent*, and thence until the time of pronouncing the outlawry; and the plaintiff in error having proved the previous proceedings, and that the outlaw was abroad at the time of suing out the *exigent*, the Court of Common Pleas held this to be sufficient, without proving the time when the judgment of outlawry was pronounced, or that the defendant was then abroad; for the substantial question was, whether the defendant was abroad at the time of the *exigent* issued.

Richardson v. Robinson, 5 Taunt. 309; and see Tidd's Prac. 139, (9th edit.)

As to the avoiding an outlawry in treason, on the party's being beyond sea, it is enacted by the 26 H. 8, c. 13, and 5 & 6 E. 6, c. 11, "That all process of outlawry to be had or made within this realm against any offenders in treason, being resiant or inhabiting out of the limits of this realm, or in any of the parts beyond the seas, at the time of the outlawry pronounced against them, shall be as good and effectual in law, to all intents and purposes, as if such offenders had been resident and dwelling within this realm at the time of such process awarded, and outlawry pronounced; (a) provided that the party so to be outlawed shall, within one year next after the said outlawry pronounced, yield himself to the chief justice of England for the time being, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced, as is aforesaid, that then he shall be received to the same traverse; and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry," &c.

(a) For this vide Dyer, 287, pl. 48; 2 Jon. 180; 4 Mod. 366. [Vide Armstrong's ca., 10 Sta. Tri. 106, (8vo ed.) and Fost. C. L. 46; and tit. *Treason*.]

It is the allowed practice of the Court of Common Pleas to suffer a defendant, coming in by *capias utlagatum* the same term on which an exigent is returnable, to avoid the outlawry without writ of error, by showing that he purchased a *supersedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c., or by showing any other matter apparent on record which makes the outlawry erroneous; as, the want of an original, or the omission of process, or want of form in a writ of proclamation, &c., or a return by a person appearing not to be sheriff, or the want of such addition as required by 1 H. 5 c. 5.: yet it is said in many books to be the constant course of the Court of King's Bench never to reverse an outlawry on the crown side, either in the same or a different term, for these or other errors of a like nature, without a writ of error. (b)

2 Hawk. P. C. c. 50, and several authorities there cited. [Beauchamp v. Tomkins, 3 Taunt. 139. (b) It appears now however to be held discretionary in the courts to re-

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lieve the party on motion, or put him to a writ of error according to the merits of each particular case. And of late years they have gone further than formerly on motion more effectually to expedite justice, save expense, and preserve the credit and character of the defendant. Tidd's Prac. 139, (9th ed.)]

It is agreed, that any outlawry whatsoever may be avoided by a defendant's coming in upon the *capias ullagatum*, and pleading a misnomer either of the name or addition in the writ, &c., as by showing that whereas he is called by such a name of baptism or surname, he hath been always known by a different one, and not by that in the writ, &c. Also it is said in many books that he may plead, that there is no such town as that whereof he is named; and it seems clearly agreed that he may plead, that at the time of the writ purchased, and ever since, he hath made his abode at some other town, and not at that in the writ, &c. And it is said, that by such plea the outlawry shall only be avoided as to the person who pleads it, (who shall not be intended to be the person meant,) and shall stand in force against the person of the name and addition in the record. But it is said, that a person of the same name and addition as are mentioned in a record of outlawry cannot avoid it by averring that there are two persons of such name and addition, and that the person intended is the elder, and he himself is the younger, but shall be put to his writ *de identitate nominis*; which is said by some to be the only remedy in such case, after an outlawry returned. And it seems, that notwithstanding, in civil cases, before an outlawry is returned, one of the same name may come into court, and show that he is not the person intended; whereupon, if the plaintiff confess it, the diversity of the names shall be entered on the roll, and a new exigent shall issue, with a fuller description of the person intended; yet this cannot be done upon an indictment without a writ of *identitate nominis*, because it would make the process variant from the indictment, which cannot be altered without the consent of the jurors.

2 Hawk. P. C. c. 50, § 9.

If A brings an *audita querela* against B, and declares that whereas B had recovered against A 200*l.* debt, &c., and thereupon the said A was outlawed, and upon a *capias ullagatum* taken, and in execution at the suit of the said B, and after from the said execution was delivered, and suffered to go at large, &c., and yet B hath taken out execution upon the said judgment, and endeavours, &c., the defendant may plead and show, that after the said enlargement, and before the purchase, of the *audita querela*, the outlawry was set aside and made void; and so conclude *quod (a) non habetur tale recordum*.

3 Co. 141, 142, Doctor Drury's case; Vaugh. 158, S. C. cited. (a) For this vide Co. Ent. 157; 3 Keb. 291; Mod. 111; Hern. Ent. 49; Ast. Ent. 143.

If a person procures another to be outlawed clandestinely, who appears openly and in public, the court will, on motion, oblige such person who procures the outlawry to reverse the same at his own costs. But if it appears that the party outlawed had lurked backward and forward between two counties, and that the person procuring the outlawry had dealt openly, and had been regular in sending down the proclamations to the sheriff of the county where he sometimes resided, the court will not interpose in this summary manner, but will leave the party to his ordinary remedies by plea or writ of error.

2 Vent. 46; 2 Jon. 211; Comb. 19; 2 Salk. 495, pl. 3, S. P., where an outlawry was reversed, on motion, at the charge of him who procured it, on affidavit, that the

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defendant was actually in the Fleet in execution for the plaintiff in another suit, and that he knew it.—But in the same page in Salk. it is said that though such motions are frequently granted in B. R., because it is a great charge to reverse an outlawry there, yet that it is otherwise in C. B., the charge there being but 16s. 8d.

[In debt upon bond entered into by the wife *dum sola*, the husband was abroad and outlawed; and the wife, though she appeared publicly, *waived*. On motion to set aside the outlawry against the wife, and to restore her the goods, taken on a special *capias utlagatum*, on affidavit that they were her separate goods, the court held, that the goods must be taken to be her husband's goods in point of law; and that, if she had any equitable right to them she must resort to a court of equity, but, as she appeared publicly, she had been wrongfully waived; and therefore the rule was made absolute for setting aside the outlawry as to the wife, but discharged as to restoring the goods.

*Biscoe v. Kennedy*, 2 Wils. 127

The defendant was taken on a *capias utlagatum*, on a Sunday, and therefore he moved to be discharged, the taking being contrary to the 29 Car. 2. But, notwithstanding the court held the taking bad, they refused to grant an attachment, and put the defendant to take the remedy given by the statute

*Osborne v. Carter, Barnes*, 319.

The defendant was waived specially on mesne process, as a single woman, by the name of Dunster; and after the exigent, and before the outlawry, she married one Priseley; and on being taken by a *capias utlagatum* after the outlawry, on motion a rule was obtained to show cause why the outlawry should not be reversed at her husband's expense, on his entering a common appearance for himself and his wife. But the rule was discharged, the court refusing to interpose in a summary way, as the marriage was after the exigent.

*White v. Dunster, Barnes*, 321.]

(G) What the Party must do in order to entitle him to a Reversal: And herein,

1. *Of appearing in Person, or by Attorney, and of giving Bail.*

REGULARLY, in all outlawries, as well personal as criminal, the party in order to reverse the same was to appear in person, and could not appear by attorney.

2 Leon. 22.—Where the husband and wife being outlawed, and the wife refusing to appear, the outlawry could not be reversed. Cro. Eliz. 611.—One outlawed prayed to appear by attorney, and upon an affidavit made of his sickness, the court *ex speciali gratia* allowed him to appear by attorney; but the clerk was commanded to enter it, *quod venit in propria persona*, the law being clear, that upon an outlawry he ought to appear in person. Cro. Ja. 462. Having once appeared in person, the residue of the proceedings may be by attorney. 2 Keb. 507.—Said that there was a difference where the error appeared on the face of the record; that in such case error may be assigned *per attorn.*, without a special rule of court for that purpose. Carth. 7. [It is now decided that the defendant need not appear before he moves to reverse the outlawry. *Graham v. Henry*, 1 Barn. & A. 132; (although the contrary had been adjudged in *French v. Moore*, Tidd's Prac. 159, n., 7th ed., and *Summervill v. Watkins*, 14 East, 536;) for until the outlawry be reversed, no writ exists to which the defendant can appear; *sed vide Solly v. Forbes*, 2 Moo. 567.]

But now by the 4 & 5 W. & M. c. 18, for the more easy and speedy reversing of outlawries in the Court of King's Bench, it is enacted, "That, from and after the first day of Easter term thence ensuing, no person or persons whatsoever, who is, are, or shall be outlawed in the said court for any cause, matter, or thing whatsoever, (treason and felony only excepted,) shall

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be compelled to come in person into, or appear in person in, the said court to reverse such outlawry, but shall or may appear by attorney, (a) and reverse the same without bail in all cases, (except where special bail shall be ordered by the said court.)”

[(a) It must appear by the affidavit that the attorney acts at the instance of the outlaw. *Plunkett v. Buchanan*, 3 Barn. & C. 736; 5 Dow. & Ry. 625, S. C.; and see 3 Dow. & Ry. 55.]]

And it is further enacted by the said statute, “That if any person or persons outlawed, or hereafter to be outlawed, in the said court, (other than for treason or felony,) shall from and after the said first day of Easter term be taken and arrested upon any *capias ullagatum* out of the said court, it shall and may be lawful to and for the sheriff or sheriffs, who hath or shall have taken and arrested such person and persons, (in all cases where special bail is not required by the said court,) to take an attorney’s engagement under his hand to appear for the said defendant or defendants, and to reverse the said outlawries, and thereupon to discharge the said defendant and defendants from such arrest; and in those cases, where special bail is required by the said court, the said sheriff and sheriffs shall and may take security of the said defendant or defendants by bond, with one or more sufficient surety or sureties, in the penalty of double the sum for which special bail is required, and no more, for his, her, or their appearance by attorney in the said court at the return of the said writ, and to do and perform such things as shall be required by the said court; (b) and after such bond taken, to discharge the said defendant and defendants from the said arrest.”

[(b) That is to put in bail to a new action, plead within the limited time, out the plaintiff in the same condition, and such like matters. 4 Burr. 2540.]

And it is further enacted by the said statute, 4 & 5 W. & M. c. 18, “That if any person or persons outlawed as aforesaid, and taken and arrested upon a *capias ullagatum*, shall not be able within the return of the said writ to give security, as aforesaid, in cases where special bail is required, so as he or they is or are committed to jail for default thereof, that whensoever the said prisoner or prisoners shall find sufficient security to the sheriff or sheriffs, in whose custody he or they shall be, for his or their appearance by attorney in the said court at some return in the term then next following, to reverse the said outlawry or outlawries, and to do and perform such other thing and things as shall be required by the said court, it shall and may be lawful to and for the said sheriff and sheriffs, after such security taken, to discharge and set at liberty the said prisoner and prisoners for the same; any law or usage to the contrary notwithstanding.”

It hath been held, that if the party outlawed comes in by *cepi corpus*, he shall not be admitted to reverse the outlawry without appearing in person, as in such case he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of the *cepi corpus*, and for doing what the court shall order.

2 Salk. 496.

By Westm. 1, 3 Ed. 1, c. 9, it is expressly provided, that those who are outlawed, or have abjured the realm, &c., should be excluded the benefit of replevin; yet it hath been always held, that the Court of King’s Bench may, in their discretion, in special cases, bail a person upon an outlawry of felony; as, where he pleads, that he is not of the same name, and therefore

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not the same person with him that was outlawed, or alleges any other error in the proceedings.

2 Hawk. P. C. c. 15, § 40. Vide tit. *Bail in Criminal Causes*, letter (D).

By the 31 Eliz. c. 3, § 3, it is enacted, "That before any allowance of any writ of error, or reversing of any outlawry be had by plea, or otherwise, through or by *want of any proclamation* to be had or made according to the form of this statute, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry." (a)

(a) Vide the stat. 4 & 5 W. & M. c. 18, *antè*.

A, who was a foreign merchant, and never in England, was outlawed at the suit of B, in an action on several promises for goods sold and delivered; and upon a special *capias ullagatum* a ship and other effects belonging to A were seized, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and restitution awarded, upon affidavits produced and read, that the defendant was never *infra legem*, i. e., that he never was in England, and therefore could not be outlawed, because that was putting him *extra legem*. *Sed per cur.*—This outlawry shall not be vacated upon such affidavits, but the defendant may bring a writ of error, which he was compelled to do, and thereupon to put in bail to the action in which he was outlawed according to the new statute of 4 & 5 W. & M. c. 18, *antè*; and then the plaintiff consented to the reversal of the outlawry.

Carth. 459; Ld. Raym. 349; *Matthews v. Erbo*, Tidd's Prac. 141, [(9th ed.)]

H was outlawed in two actions; one was for 10*l.*, the other for 40*s.*; and upon reversing the outlawry the court took special bail for the first, and an appearance for the other, upon the statute 4 & 5 W. & M. c. 18, and the recognisance was taken pursuant to 31 Eliz. c. 3, § 3.

2 Salk. 496.

[The defendant was outlawed in a personal action, without any affidavit made of the plaintiff's demand; and having brought error, he assigned his being beyond sea at the time of the outlawry, for which the court made no difficulty to reverse it.(b) But then the question was, upon what terms they should do it, the plaintiff insisting upon special bail, and having now made a proper affidavit; and the defendant insisting to file common bail only. The court, upon considering the words of 4 & 5 W. & M. c. 18, § 3, which empowers the outlaw to appear by attorney, (as he did here,) and says, "It shall be reversed without bail in all cases, but where special bail shall be ordered by the court," declared, they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before, was no objection; because that is only necessary to warrant an arrest; and here was one in time for the new action that must be brought. And although the 31 Eliz. c. 3, § 3, is the only act that expressly requires bail, it is not to be inferred from thence that in other cases it is not to be insisted upon; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. And it is now settled, that on reversing an outlawry for any other error in law besides the want of proclamations, the bail is *common or special*, in like manner as upon the arrest.

*Serocold v. Hamson*, 2 Stra. 1178; 1 Wils. 3, S. C., [more fully reported 12 East, 2 H 2

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624, n.; Tidd's Prac. 134, (9th ed.); Ibid. 141, (9th ed.) (b) And such error is not answered by showing that defendant went beyond sea to avoid the plaintiff's process. *Hesse v. Wood*, 4 Taunt. 691; and although this appeared, still the court reversed the outlawry on the usual terms, taking a recognisance of bail in the *alternative*, either to pay the condemnation money, or render. But in *Graham v. Henry*, 1 Barn. & A. 133, the Court of King's Bench, in reversing the outlawry on these terms, seem to have relied on the circumstance of the defendant *not* having gone abroad to avoid process; and see below.¶

Where special bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversal.

1 Ld. Raym. 605; 2 Stra. 951; 2 Barnardist. 298, S. C.

The bail may render the defendant, and are not, at all events, answerable for the debt.

*Impey*, 456.

¶Where the outlawry is reversed, on the stat. 31 Eliz. c. 3, for want of proclamations, the recognisance of bail is, according to the words of the statute, absolute to satisfy the condemnation.

Thus where the third proclamation was made at the door of the church of the parish of which the defendant was described in the writ and in the bond on which the action was brought, but where he did not reside at the time when the proclamation was made, the court reversed the outlawry as for want of proclamations, and ordered bail to be taken to pay the condemnation money, according to the 31 Eliz. c. 3, § 3.

*Rayer v. Cooke*, 3 Barn. & C. 529; 5 Dowl. & Ry. 302, S. C.

But where the third proclamation was made less than one month before the *quinto exactus*, and on that ground the outlawry was reversed, the court ordered special bail in the *alternative* in the common form; apparently considering it as a reversal for irregularity, and not under the statute of Elizabeth.

*Taylor v. Waters*, 2 Barn. & C. 353; 3 Dow. & Ry. 575, S. C.

And so in one case, where the reversal was on motion, and for a common law error, but on appearance by attorney under the stat. 4 & 5 W. & M. c. 18, it was held that the recognisance should be absolute. But upon *error brought* by the defendant *in person* to reverse an outlawry for a *common law* error, the court have held that the recognisance should be in the ordinary alternative form, giving the bail the power of rendering; for they considered *such* a reversal to be in general a matter of *right*, and different from a case where the party asked the court by *motion* to interfere. In a subsequent case, however, the court *on motion* reversed an outlawry, on the defendant's paying all costs, and putting in bail in the alternative, it appearing that there had been no real delay. It seems, therefore, that where the reversal is *on motion*, and the case is not within the 31 Eliz., the court will exercise their discretion as to the terms of the recognisance, according to the merits of the particular case.

*Matthews v. Gibson*, 8 East, 527; *Havelock v. Geddes*, 12 East, 622, confirming *Serocold v. Hampson*, 12 East, 624; and see 4 Taunt. 691; *Graham v. Grill*, 1 Maul. & S. 408; and see *Graham v. Henry*, 1 Barn. & A. 131, *acc.*, and Tidd, 142, (9th ed.)¶

Defendant being arrested on a *capias ullagatum*, the sheriff took an attorney's engagement, under his hand, to appear for the defendant, and reverse the outlawry, without taking security by bond in double the sum for which bail was required, pursuant to the above statute of 4 & 5 W. & M. On showing cause why an attachment should not issue against the sheriff for

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discharging the defendant out of his custody, it was urged, that he neither did, nor could know, that it was a case requiring bail, as the *capias utlagatum* was not marked for bail; and that the 12 G. 1, c. 29, required an affidavit; and that the sum, for which bail is to be taken, is to be marked on the process, &c. For the plaintiff, it was urged, that process of outlawry is not within the statute of 12 G. 1; that this was by *special original*, and the cause of action is expressed in the original process, in which it appears, the plaintiff was entitled to bail. The court were clear, that this was not a case within the 12 G. 1, and thought the sheriff had acted improperly; but, as there was an affidavit of the under-sheriff, that he had acted to the best of his understanding without any ill intention, they enlarged the rule, in order to give the sheriff an opportunity to put in bail. After which the sheriff undertook to pay the debt and costs.

*Cracraft v. Gledowe*, 3 Burr. 1482.

The statute of 4 & 5 W. & M. hath been construed not to extend to *criminal* cases; at least, not to misdemeanors after conviction. And even in *civil* cases, the defendant cannot be bailed where he was not bailable on the process to outlawry; for it was the design of the statute to put him in the same condition as if he had not been outlawed; and therefore he is not bailable when taken upon an outlawry *after* judgment.

*Rex v. Wilkes*, 4 Burr. 2539-40.

Two persons were outlawed in a joint action against them, and one moved, that on filing common bail he might have liberty to reverse the outlawry. *Sed per cur.*—The writ of error to reverse the outlawry must be brought in the names of both the parties that are outlawed; and if one only appears, the other may be summoned and severed, and then the outlawry may be reversed for the benefit of the party appearing.

*Symmons v. Bing*, 2 Salk. 496.]

¶In general an outlawry can only be reversed on payment of costs. But if the process has been abused and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit, or being at large, did not abscond, but appeared publicly and might have been arrested, or served with process, the court on motion will order the plaintiff to reverse the outlawry at his own expense. So where the plaintiff had proceeded to outlaw a female, and obtained judgment of waiver, the court set it aside on motion with costs, it appearing that she was in prison during the time the several processes were sued out, and that the plaintiff was aware of that fact, and knew where to find her.

*Tidd's Prac.* 143, (9th ed.,) and cases there cited.¶

2. Of suing out a *Scire Facias*.

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by writ of error, without a *scire facias* against all the ter-tenants and lords mediate and immediate. But it is (a) settled, that such *scire facias* is not necessary in the case of high treason.

*Dyer*, 34, pl. 20; *Cro. Eliz.* 235; *Keb.* 141, pl. 11; *Sid.* 316; 3 *Keb.* 29; 3 *Mod.* 42, 47; 4 *Mod.* 366; 2 *Hal. Hist. P. C.* 209, S. P., and that such writ is to issue returnable at fifteen days; and if any lords do appear, they may plead to the errors; and if the sheriff return there are no lands, &c., then the court proceeds to examine the errors. (a) So ruled, *Mich.* 12 Annæ, the *Queen v. Strafford*, upon examination of all the precedents. 2 *Hawk. P. C.* c. 50, § 13; *Ca. Law and Eq.* 186.

## (H) The Effects and Consequences of a Reversal.

Also it is said, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the attorney-general confesses it.

2 Salk. 495, pl. 5; Ld. Raym. 154.

[Where the defendant has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper.

Tyde, 131, 154.]

## (H) The Effects and consequences of a Reversal: And herein,

1. *Where the Proceedings on the Reversal are in the same Plight as if no Outlawry had been.*

It is agreed that after an outlawry of treason or felony is reversed the party shall be put to plead to the indictment, for that still remains good, and (a) he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below to proceed by the statute of 6 Hen. 6, c. 6.

Cro. Ja. 464; Cro. Car. 365; 3 Mod. 42; 6 Mod. 115. (a) 2 Hal. Hist. P. C. 209.

So if a man be outlawed by process in an information, and come in and reverse the outlawry, he must plead *instantly* to the information.

Salk. 371, pl. 10; Rex v. Hill, 5 Mod. 141, S. P.

The law is the same in civil cases; and therefore if an outlawry in a personal action be reversed, the original remains.

March 9.

Trespass for taking and detaining his beasts till he made a fine; the action was laid in Sussex. The defendant pleads, that the cause of action did not accrue within six years before suing of the writ. The plaintiff replies, that at another time he brought an original in battery in London, intending when the defendant had appeared to have declared for this trespass; and that the defendant was outlawed in London; and that within such a time after the reversal of the outlawry he declared here. The defendant demurred; and for the defendant it was insisted, that the original being laid in London, he could not in this action declare in another county, though the cause of action be transitory. But, upon information by the prothonotaries, that the course of the court is, that although the original be laid in London, for expediting the outlawry, yet, when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory; and the statute 21 Jac. 1, c. 16, gives to plaintiffs generally a power to commence a new suit within the year after the outlawry reversed; it was ruled, that so he might do in this case to warrant his declaration within the course of the court, and judgment was given for the plaintiff.

3 Lev. 145, Whitwick v. Hovenden.

2. *To what the Party shall be restored on Reversal of the Outlawry.*

It hath been adjudged, that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be (b) reversed, the party may enter on the patentee, and needs neither to sue a petition to the king, nor a *scire facias* against the patentee.

And. 188. (b) Shall, after outlawry reversed, be restored to his law, and be of ability to sue. Co. Lit. 288 b.

If the goods of a person outlawed are sold by the sheriff upon a *capias*



## (H) The Effects and Consequences of a Reversal.

*utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves; because the sheriff was not compelled to sell those goods, but only to keep them to the use of the king.

5 Co. 90, *Hoe's case*; Roll. Abr. 778, S. C. cited; Cro. Eliz. 278, S. P. adjudged; where a termor being outlawed upon the statute of recusancy, the Lord Treasurer and Barons of the Exchequer sold the term; and vide 2 Jon. 101; 2 Show. 68, pl. 52, and 3 Keb. 871, that there shall be restitution of the profits actually paid into the Exchequer. Vide *etiam* Bunb. 104, 220.

If an advowson comes to the king by forfeiture upon an outlawry, and, the church becoming void, the king presents, and then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson.

Moor, 269, *Beverley v. Cornwall*.

But, if the church is void at the time of the outlawry, and the presentation is thereby forfeited as a chattel principally and distinct of itself, there, upon the reversal of the outlawry, the party shall be restored to the presentation.

Moor, 269, agreed *per curiam*.

If a termor being outlawed for felony grants over his term, and after the outlawry is reversed, the grantee may have trespass, for the profits taken between the reversal of the outlawry and the assignment; for by the reversal it is as if no outlawry had been, and there is no record of it.

Cro. Eliz. 170, *Ognal's case*, and 13 Co. 20, 22.

It is said, that if a man be outlawed in the King's Bench, and the party's goods seized into the king's hands, and then the outlawry be reversed, there can be no restitution; the reason whereof is, for that the court of King's Bench cannot send a writ to the treasurer; and the Court of Exchequer have no record before them to issue out a warrant for restitution.(a)

5 Mod. 61. (a) *Sed quæ*. If restitution would not be made on petition to the king?

It hath been adjudged in Chancery, that if A, being possessed of several houses for a long term of years, mortgages the same, and is outlawed for high treason, upon which those houses are seized into the king's hands, and the same granted for valuable consideration to J S, who likewise gets an assignment of the mortgage, that yet the representative of A may redeem the mortgage upon reversal of the outlawry; and herein the Lord Keeper said, that the judgment upon the reversal is, that the party shall be restored to all that has not been answered to the king; which in all cases has been understood of the mesne profits answered to the king, and not as to the principal thing itself, though seized into the king's hands; and that it was undoubtedly so as to a freehold or inheritance. and he saw no substantial difference in the case of a leasehold.

3 Vern. 312, *Peyton v. Ayliffe*; and 2 Lev. 49, the case of *Pinfold v. Northey*.

## PAPISTS AND POPISH RECUSANTS.

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THE laws for restraining the growth of popery, by which papists are subjected to divers penalties, forfeitures, disabilities, and inconveniences, may be considered in general as relating to popish (a) recusants, such as refuse to make the declaration against popery, and such as promote, encourage, or profess the popish religion. And these laws, though made for the advancement of religion and the public good, yet, being considered as penal laws, have, like all other penal laws, been construed strictly.

(a) *i. e.* Those who refuse to come to church, and being persons professing the popish religion, and convicted of such refusal or recusancy, are termed popish recusants convict. By the 23 Eliz. c. 1 extends to all recusants; and the courts cannot take notice of the grounds of the recusancy, but must punish them for not coming to church, without examining into the cause why they did not. *Skin. 99, pl. 14, per Sanders, Ch. J.*; but for this vide tit. *Heresy, and Offences against Religion*.—And what shall be evidence to prove a person a popish recusant convict, vide *Keb. 7*.

For the better understanding of these penalties, &c., the laws herein are ranked under the following heads:—

Hawk. P. C. c. 12, 13, 14.

(A) The Disabilities, Restraints, Forfeitures, and Inconveniences which Popish Recusants are subject to: And herein,

1. Of their Disability to bring any Action.
2. Of bearing any public Office or Charge.
3. Of claiming any Part of a Husband's personal Estate.
4. Of claiming an Estate by Curtesy, or by way of Dower, after a Marriage against Law.

2. Of the Restraints they are put under: And herein,

1. From going five Miles from Home.
2. From coming to Court.
3. From keeping Arms.
4. From coming within ten Miles of London.

3. Of the Forfeitures they are liable to: And herein,

1. That of two Parts of a Jointure or Dower.
2. That of 20*l.* for not receiving the Sacrament yearly after conformity.
3. That of 100*l.* for an unlawful Marriage.
4. That of 100*l.* for an Omission of lawful Baptism.
5. That of 20*l.* for an unlawful Burial.

4. Of the Inconveniences they are subject to: And herein,

1. That their Houses may be searched for Reliques, whether they be Men or Women.
2. If they be Women and married, that they may be committed.

(B) Of the Offence of not making a Declaration against Popery, and the Restraints it subjects the Parties to: And herein,

1. From sitting in Parliament.
2. Holding a Place at Court.
- || 3. Holding Offices, civil and military.||

## (A) The Disabilities, Restraints, Forfeitures, &c.

4. *From living within ten Miles of London.*
  5. *From keeping Arms.*
  - (C) Of the Offence in promoting or professing the Popish Religion: And herein,
    1. *Of the Offence of saying or hearing Mass or other Popish Service.*
    2. *Of giving or receiving Popish Education.*
    3. *Of buying or selling Popish Books.*
    4. *Of keeping School.*
    5. *Of withholding a competent Maintenance from a Protestant Child.*
    6. *Of the Disability of those professing the Popish Religion to present to a Church.*
    7. *Of their Disability to purchase.*
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## (A) The Disabilities, Restraints, Forfeitures, and Inconveniences which Popish Recusants are subject to: And herein,

### 1. Of their Disability to bring any Action.

By the 3 Jac. 1, c. 5, § 11, it is enacted, "That every Popish recusant convict shall stand to all intents and purposes disabled as a person lawfully excommunicated, and if such person had been so denounced and excommunicated according to the laws of this realm, until he or she shall conform, &c., and that every person sued by such person so disabled, may plead the same in disabling of such plaintiff as if he or she were excommunicated by sentence in the ecclesiastical court, except the action of such recusant do concern some hereditament or lease, which is not to be seized into the King's hands by force of some law concerning recusancy."

In the construction of this branch of the statute, it hath been holden,

That the plea of such a conviction, like all other pleas in disability, ought to be pleaded before (a) imparlance, and also conclude with a (b) demand if the plaintiff shall be answered.

Noy, 89; Latch. 176; Hett. 18; 1 Hawk. P. C. c. 12, § 2. (a) Cannot be pleaded after a general imparlance, but may be pleaded *purs darrein continuance*, because being in disability of the person, may accrue after a continuance. Mod. Ca. in Law and Eq. 43, 381. (b) In debt for rent by the plaintiffs as executors of J S, defendant pleads in abatement by *pet. judicium de brevi, &c.*, for that one of the plaintiffs is a popish recusant convict, and *quasi excom.* by this statute; but it was held, that this, as here, ought not to be pleaded in abatement, because the writ is not abated thereby, but only suspended; and the pleading ought to be *responderi non debent*. 3 Lev. 208.—So, where judgment was demanded generally. Mod. Ca. in Law and Eq. 43, 381.

That such plea ought also to show before what justices the conviction was, that the court may know where to send for a certificate thereof, if it be denied; and also that the record itself, or at least a certificate thereof, ought to be immediately produced, according to the general rule of law, as to all dilatory pleas grounded on records.

Noy, 89; Latch. 176; 3 Lev. 333, 334.

That if, after such a plea, it be certified that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapse, and be convict again, the defendant cannot plead the same in disability a second time.

Hett. 176.

That it must appear, either from the conviction itself, or by proper averments, that the plaintiff is convicted of popish recusancy, because no recusants, except popish ones, are within the said clause. But this is sufficiently set

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(A) The Disabilities, Restraints, Forfeitures, &c.

forth, by alleging, that the plaintiff being *papalis recusans* was indicted and convicted *secundum formam statuti*, &c.

3 Lev. 11, 12, 332, 333; 2 Lutw. 1117.

It seems to be the better opinion, that this being a penal law, and therefore to be construed strictly, the words *as persons lawfully excommunicate*, &c., mean no more than disabling the party, in the same manner as an excommunicated person, to bring an action, but do not subject the party to the other consequences of an excommunication.

2 Bulst. 155; Crawley, 216; Hawk. P. C. c. 12, § 6.

### 2. Of bearing any public Office or Charge.

By the 3 Jac. 1, c. 5, § 8, it is enacted, "That no recusant convict shall at any time practise the common law of this realm as a counsellor, clerk, attorney, or solicitor in the same; nor shall practise the civil law as advocate or proctor; nor practise physic, nor use or exercise the trade or art of an apothecary; nor shall be judge, minister, clerk, or steward of or in any court, or keep any court; nor shall be register or town-clerk, or other minister or officer in any court; nor shall bear any office or charge as captain, lieutenant, corporal, serjeant, ancient-bearer, or other office in camp, troop, band, or company of soldiers; nor shall be captain, master, governor, or bear any office or charge of or in any ship, castle, or fortress of the king's majesty's, his heirs and successors, but be utterly disabled for the same; and every person offending herein shall also forfeit for every such offence 100*l.*, the one moiety whereof shall be to the king's majesty, his heirs and successors, and the other moiety to him that will sue for the same by action of debt, bill, plaint, or information, in any of the king's majesty courts of record; wherein no essoin, protection, or wager of law shall be admitted or allowed."

And by § 9, of the said statute, it is further enacted, "That no popish recusant convict, or any having a wife being a popish recusant convict, shall exercise any public office or charge in the commonwealth, but shall be utterly disabled to exercise the same by himself or by his deputy, except such husband himself, and his children which shall be above the age of nine years abiding with him, and his servants in household, shall once every month at the least, not having any reasonable excuse to the contrary, repair to some church or chapel usual for divine service, and there hear divine service; and the said husband, and such his children and servants as are of meet age, receive the sacrament of the Lord's Supper at such times as are limited by the laws of this realm, and to bring up his said children in the true religion."

On these sections it hath been observed, 1st, That the latter extends to all public offices and charges in general, whereas the former extends only to those which are particularly enumerated. 2dly, That this latter expressly disables a popish recusant to exercise such an office by himself or his deputy, but the other says nothing at all of the exercise of an office by a deputy.

Hawk. P. C. c. 12, § 9.

### 3. Of claiming any Part of a Husband's personal Estate.

By the 3 Jac. 1, c. 5, § 10, it is enacted, "That every woman being a popish recusant convict, (her husband not standing convicted of popish recusancy,) which shall not conform herself and remain conformed, but shall forbear to repair to some church or usual place of common prayer, and

## (A) The Disabilities, Restraints, Forfeitures, &c.

there hear divine service and sermon, if any then be, and receive the sacrament of the Lord's Supper, according to the laws of this realm, by the space of one whole year next before the death of her said husband, shall not only be disabled to be executrix or administratrix of her said husband, but also to have or demand any part of her said husband's goods or chattels by any law, custom, or usage whatsoever;" and by 3 Jac. 1, c. 5, § 13, every woman is put under the like disability, being a popish recusant, who shall be married otherwise than according to the church of England.

### 4. Of claiming an Estate by Curtesy, or by Way of Dower, after a Marriage against Law.

By the 3 Jac. 1, c. 5, § 13, it is enacted, "That every man, who, being a popish recusant convict, shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be disabled to have any estate as tenant by the curtesy; and that every woman, being a popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled to hold her dower, or jointure, or widow's estate."

### 2. Of the Restraints they are put under: And herein,

#### 1. From going five Miles from Home.

To this purpose it is enacted, by 35 Eliz. c. 2, and 3 Jac. 1, c. 5, § 6, 7, "That every popish recusant convict shall repair to his place of dwelling, &c., and not remove above five miles from thence, unless he be urged by process, &c., or have a license from the privy council, &c., or under the hands and seals of four justices of the peace, with the assent in writing of the lieutenant of the county, or of the bishop, &c., (every license of which kind by justices of peace must express both the particular cause and the time for which it was given, and ought not to be granted without a previous oath of some reasonable cause,) under pain of forfeiting all his goods and hereditaments, (whether freehold or copyhold,) for his life, or of abjuring the realm, if he be not worth twenty marks a year, or forty pounds in goods, unless he recant before conviction, and also continue conformable."

In the construction hereof it hath been holden, that the privy council may grant such license without any such special cause or oath, &c., but that justices of peace cannot. Also it hath been holden, that in pleading a license of justices of the peace, it must be expressly shown, that it was made under their hands and seals; the cause in particular for which it was granted must be set forth, and the time for which it was limited, and that the party was sworn to the truth of such cause.

Hawk. P. C. c. 12, § 13; Cro. Ja. 352; Roll. R. 108; Moor, 836.

It is said, that if the same person be both a justice of peace and a lieutenant, he cannot both join in a license as justice of peace, and also give his assent as lieutenant, but can only act in one capacity.

Hawk. P. C. c. 12, § 4.

It seems, that the miles shall be computed according to the English manner, allowing 5280 feet, or 1760 yards to each mile; and that the same shall be reckoned not by straight lines, as a bird or arrow may fly, but according to the nearest and most usual way.

Cawley, 130; Cro. Eliz. 212.

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### (A) The Disabilities, Restraints, Forfeitures, &c.

#### 2. From coming to Court.

By the 3 Jac. 1, c. 5, § 2, it is enacted, "That no popish recusant convict shall come into the court or house where the king or his heir apparent shall be, unless he be commanded so to do by the king, upon pain of 100*l*."

And it is further enacted by 3 Car. 2, stat. 2, § 5 & 6, "That every popish recusant convict, who shall come advisedly into or remain in the presence of the king or queen, or shall come into the court or house where they or any of them reside, shall be disabled to hold or execute any office or place of trust, civil or military, or to sue in law or equity, or to be an executor, &c., or capable of any legacy or deed of gift, and shall forfeit for every offence 500*l*., unless such person do, within the term next after such his coming or remaining, take the oaths of allegiance and supremacy, and make the declaration against transubstantiation and the invocation of saints, &c., in the Court of Chancery."

#### 3. From keeping Arms.

By the 3 Jac. 1, c. 5, § 27, 28, 29, it is enacted, "That all such armour, gunpowder, and munition of whatsoever kind, as any popish recusant convict shall have in his own house, or elsewhere, or in the possession of any other, at his disposition, shall be taken from him by warrant of four justices of peace at their general or quarter sessions, (except such necessary weapons as shall be allowed him by the said four justices for the defence of his person or house,) and that the said armour, &c., so taken, shall be kept at the costs of such recusants in such place as the said four justices at their said sessions shall appoint; and that if any such recusant, having such armour, &c., or if any other person who shall have any such armour, &c., to the use of such recusant, shall refuse to discover to the said justices, or any of them, what armour he hath, or shall let or hinder the delivery thereof to any of the said justices, or to any other person authorized by their warrant to take the same; that then every person so offending shall forfeit his said armour, &c., and also be imprisoned for three months without bail, by warrant from any justice of peace of such county. And it is further enacted, that notwithstanding the taking away such armour, &c., yet such recusant shall be charged with the maintaining of the same, and with the providing of a horse, &c., in such sort as others of his majesty's subjects."

#### 4. From coming within ten Miles of London.

By the 3 Jac. 1, c. 5, § 4, 5, it is enacted, "That no popish recusant, &c., shall remain within the compass of ten miles of London, under pain of 100*l*., except such persons as at the time of the said act did use some trade, mystery, or manual occupation in London, &c., and such as shall have their only dwelling in London," &c.

### 3. Of the Forfeitures they are liable to: And herein,

#### 1. That of two Parts of a Jointure or Dower.

By the 3 Jac. 1, c. 5, § 10, it is enacted, "That every married woman, being a popish recusant convict, (her husband not standing convicted of popish recusancy,) who shall not conform herself and remain conformed, but shall forbear to repair to some church or usual place of common prayer, and there to hear divine service and sermon, if any then be, and receive the sacrament of the Lord's Supper, according to the laws of this realm, within

## (A) The Disabilities, Restraints, Forfeitures, &c.

one year next before the death of her said husband, shall forfeit to the king the profits of two parts of her jointure, and dower of any hereditaments of her said husband," &c.

### 2. That of 20*l*. for not receiving the Sacrament yearly after Conformity.

By the 3 Jac. 1, c. 5, § 1, 2, 3, it is enacted, "That if any popish recusant convict who hath conformed himself to the church, &c., shall not receive the sacrament in his own parish church, &c., within one year after his conformity, he shall forfeit 20*l*., and for the second year, 40*l*., and for every year after 60*l*." &c.

### 3. That of 100*l*. for an unlawful Marriage.

By the 3 Jac. 1, c. 5, § 13, it is enacted, "That every popish recusant convict who shall be married to a woman who is no inheritrix, otherwise than according to the church of England, shall forfeit 100*l*."

### 4. That of 100*l*. for an Omission of lawful Baptism.

By the 3 Jac. 1, c. 5, § 14, it is enacted, "That every popish recusant shall, within one month after the birth of his child, cause the same to be baptized by a lawful minister according to the laws of this realm, in the open church of the same parish where the child shall be born, or in some other church near adjoining, or chapel where baptism is usually administered; or if, by infirmity of the child it cannot be brought to such place, then the same shall within the time aforesaid be baptized by the lawful minister of the said parishes or places aforesaid; upon pain that the father of such child, if he be living, by the space of one month next after the birth of such child, or if he be dead within the said month, then the mother of such child shall for every such offence forfeit 100*l*." &c.

### 5. That of 20*l*. for an unlawful Burial.

By the 5 Jac. 1, c. 5, § 15, it is enacted, "That if any popish recusant, not being excommunicate, shall be buried in any other place than in the church or churchyard, or not according to the laws of this realm, the executors, &c., of such recusant knowing the same, or the party that causeth him to be so buried, shall forfeit 20*l*." &c.

### 4. *Of the Inconveniences they are subject to: And herein,*

#### 1. That their Houses may be searched for Reliques, whether they be Men or Women.

To this purpose it is enacted by the 3 Jac. 1, c. 5, § 26, "That any two justices of peace, and all mayors, bailiffs, and chief officers of cities and towns corporate in their respective jurisdictions, may search the house and lodgings of every popish recusant convict for popish books and reliques; and that if any altar, pix, beads, pictures, or such like popish relique, or any popish book be found in the custody of such person, as in the opinion of the said justices, &c., shall be unmeet for him or her to have or use, it shall be defaced or burnt, if it be meet to be burnt; and if it be a crucifix, or other relique of any price, the same shall be defaced at the general quarter sessions in the county where it shall be found, and then restored to the owner."

[Repealed by 31 G. 3, c. 32.]

(B) Not making a Declaration against Popery. (*Relief Act.*)

2. If they be Women, and married, that they may be committed.

To this purpose it is enacted by the 7 Jac. 1, c. 6, § 28, "That if any married woman, being a popish recusant convict, shall not within three months after her conviction conform herself, and repair to church and receive the sacrament, &c., she may be committed to prison by one of the privy council, or by the bishop, if she be a baroness; or if under that degree, by justices of peace, whereof one to be of the *quorum*, there to remain till she perform, &c., unless the husband will pay to the king ten pounds a month for her offence, or else the third part of all his lands, &c., at the choice of the husband," &c.

[Repealed by stat. 31 G. 3, c. 32, § 3, in favour of persons taking the oath therein required.]

(B) Of the Offence of not making a Declaration against Popery, and the Restraints it subjects the Parties to: And herein,

1. *From sitting in Parliament.*

By the 30 Car. 2, stat. 2, c. 1, it is enacted, "That no peer shall vote or make his proxy in the House of Peers, or sit there during any debate; and that no member of the House of Commons shall vote or sit there during any debate after the Speaker is chosen, until such peer or member shall take the oaths of allegiance and supremacy, and make a declaration of his belief that there is no transubstantiation in the sacrament of the Lord's Supper, and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the Church of Rome, are superstitious and idolatrous, &c., on pain that every such offender shall be adjudged a popish recusant convict, and disabled to hold or execute any office, &c., or from thenceforth to sit or vote in either house of parliament, to sue in law or equity, or to be guardian, executor, or administrator, or capable of any legacy or deed of gift, and shall forfeit for every offence 500*l.*"

[[Repealed by 10 G. 4, c. 7, which gives a substituted oath in lieu of the oaths of allegiance, supremacy, and abjuration: see the act, *post.*]]

[[By 10 Geo. 4, c. 7, intituled *An Act for the relief of his majesty's Roman Catholic subjects*, reciting that by various acts of parliament certain restraints and disabilities are imposed on the Roman Catholic subjects of his majesty, to which other subjects of his majesty are not liable; and that it is expedient that such restraints and disabilities shall be from henceforth discontinued; and that by various acts certain oaths and declarations, commonly called the declaration against transubstantiation, and the declaration against transubstantiation and the invocation of saints, and the sacrifice of the mass, as practised in the Church of Rome, are or may be required to be taken, made, and subscribed by the subjects of his majesty, as qualifications for sitting and voting in parliament, and for the enjoyment of certain offices, franchises, and civil rights, it is enacted, "That from and after the commencement of this act, all such parts of the said acts as require the said declarations, or either of them, to be made or subscribed by any of his majesty's subjects as a qualification for sitting and voting in parliament, or for the exercise and enjoyment of any office, franchise, or civil right, be and the same are (save as hereinafter provided and excepted) hereby repealed."

And by § 2, it is enacted, "That after the commencement of this act, it shall be lawful for any person professing the Roman Catholic religion, being a peer, or who shall be returned as a member of the House of Commons, to sit and vote in either house of parliament respectively, being in all other re-



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spects qualified to sit and vote therein, upon taking and subscribing the following oath, instead of the oaths of allegiance, supremacy, and abjuration :—

“ I, A B, do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty King George the Fourth, and will defend him to the utmost of my power against all conspiracies and attempts whatever, which shall be made against his person, crown, or dignity ; and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them : And I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown ; which succession, by an act intituled *An Act for the further limitation of the crown, and better securing the rights and liberties of the subject*, is and stands limited to the Princess Sophia, Electress of Hanover, and the heirs of her body, being protestants ; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm : And I do further declare, That it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated or deprived by the pope, or any other authority of the see of Rome, may be deposed or murdered by their subjects, or by any person whatsoever : And I do declare, that I do not believe that the pope of Rome, or any other foreign prince, prelate, person, state, or potentate, hath or ought to have any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm : I do swear that I will defend to the utmost of my power the settlement of property within this realm as established by the laws ; and I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law within this realm : and I do solemnly swear, that I never will exercise any privilege, to which I am or may become entitled, to disturb or weaken the protestant religion or protestant government in the United Kingdom : And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever. So help me God.”

And by § 3, it is further enacted, “ That wherever in the oath, hereby appointed and set forth, the name of his present majesty is expressed or referred to, the name of the sovereign of this kingdom for the time being, by virtue of the act for the further limitation of the crown and better securing the rights and liberties of the subject, shall be substituted from time to time with proper words of reference thereto.”

Provided always, and be it further enacted, “ That no peer professing the Roman Catholic religion, and no person professing the Roman Catholic religion, who shall be returned a member of the House of Commons after the commencement of this act, shall be capable of sitting or voting in either house of parliament respectively, unless he shall take and subscribe the oath hereinbefore appointed and set forth, before the same persons, at the same times and places, and in the same manner as the oaths and the declaration now required by law are respectively directed to be taken, made, and subscribed ; and that any such person professing the Roman Catholic religion who shall sit or vote in either house of parliament without having first taken and subscribed, in the manner aforesaid, the oath in this act appointed and set forth, shall be subject to the penalties, forfeitures, disabilities, and the offence of

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so sitting or voting shall be followed and attended by and with the same consequences, as are by law enacted and provided in the case of persons sitting or voting in either house of parliament respectively without the taking, making, and subscribing the oaths and the declaration now required by law."

And be it further enacted, "That it shall be lawful for persons professing the Roman Catholic religion to vote at elections of members to serve in parliament for England and for Ireland, and also to vote at the elections of representative peers of Scotland and Ireland, and to be elected such representative, being in all other respects duly qualified, upon taking and subscribing the oath hereinbefore appointed and set forth instead of the oaths of allegiance, supremacy, and abjuration, and instead of the declaration now by law required, and instead also of such other oath or oaths as are now by law required to be taken by any of his majesty's subjects professing the Roman Catholic religion, and upon taking also such other oath or oaths as may now be lawfully tendered to any person offering to vote at such elections."

And be it further enacted, "That the oath hereinbefore appointed and set forth shall be administered to his majesty's subjects professing the Roman Catholic religion, for the purpose of enabling them to vote in any of the cases aforesaid, in the same manner, at the same time, and by the same officers or other persons as the oaths for which it is hereby substituted are or may be now by law administered; and that in all cases in which a certificate of the taking, making, or subscribing of any of the oaths or of the declaration now required by law is directed to be given, a like certificate of the taking or subscribing of the oath hereby appointed and set forth shall be given by the same officer or other person, and in the same manner as the certificate now required by law is directed to be given, and shall be of the like force and effect."

And be it further enacted, "That in all cases where the persons now authorized by law to administer the oaths of allegiance, supremacy, and abjuration, to persons voting at elections, are themselves required to take an oath previous to their administering such oaths, they shall, in addition to the oath now by them taken, take an oath for the duly administering the oath hereby appointed and set forth, and for duly granting certificates of the same."

"And whereas, in an act of parliament of Scotland made in the eighth and ninth session of the first parliament of King William the third, intituled *An Act for preventing the growth of popery*, a certain declaration or formula is therein contained, which it is expedient should no longer be required to be taken and subscribed; be it therefore enacted, That such parts of any acts now authorized the said declaration or formula to be tendered, or require the same to be taken, sworn, and subscribed, shall be and the same are hereby repealed, except as to such offices, places, and rights, as are hereinafter excepted; and that from and after the commencement of this act it shall be lawful for persons professing the Roman Catholic religion to elect and be elected members to serve in parliament for Scotland, and to be enrolled as freeholders in any shire or stewartry of Scotland, and to be chosen commissioners or delegates for choosing burghesses to serve in parliament for any districts or burghs in Scotland, being in all other respects duly qualified, such person always taking and subscribing the oath hereinbefore appointed and set forth, instead of the oaths of allegiance and abjuration as now required by law, at such time as the said last-mentioned oaths, or either of them, are now required by law to be taken."

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"And be it enacted, That no person in holy orders in the Church of Rome shall be capable of being elected to serve in parliament as a member of the House of Commons; and if any such person shall be elected to serve in parliament as aforesaid, such election shall be void; and if any person, being elected to serve in parliament as a member of the House of Commons, shall, after his election, take or receive holy orders in the Church of Rome, the seat of such person shall immediately become void: and if any such person shall, in any of the cases aforesaid, presume to sit or vote as a member of the House of Commons, he shall be subject to the same penalties, forfeitures, and disabilities as are enacted by an act passed in the forty-first year of the reign of King George the Third, intituled *An Act to remove doubts respecting the eligibility of persons in holy orders to sit in the House of Commons*; and proof of the celebration of any religious service by such person, according to the rites of the Church of Rome, shall be deemed and taken to be *prima facie* evidence of the fact of such person being in holy orders within the intent and meaning of this act."

2. *Holding a Place at Court.*

By the 30 Car. 2, stat. 2, § 9, 12, 13, it is enacted, "That every person who shall be a sworn servant to the king shall take the said oaths, and subscribe the said declaration in Chancery, the next term after he shall be so sworn a servant, &c., and that if any such person neglecting so to do shall advisedly come into or remain in the presence of the king or queen, or shall come into the court or house where they are, or either of them reside, he shall suffer all the penalties expressed in the foregoing section; unless such person coming into the king's presence, &c., shall first have license so to do by warrant under the hands and seals of six privy councillors, by order of the privy council, upon some urgent occasion therein to be expressed; which license shall not exceed ten days, and shall be first filed, &c., in the petty-bag office for anybody to view without fee, &c.; and no person to be licensed for above thirty days in one year."

[The fifth section subjects peers of Great Britain and Ireland, and members of the House of Commons, not conforming as mentioned in the text, and all recusants convict, who shall come unadvisedly into or remain in the king or queen's presence, to the like penalties. But this clause is repealed as to peers of Great Britain and Ireland by stat. 31 G. 3, c. 32, § 20, who shall take the oaths therein appointed.]

||3. *Holding Offices, civil and military.*||

||By 25 Car. 2, c. 2, intituled *An Act for preventing dangers which may happen from popish recusants*, it is enacted, (§ 2,) "That every person that shall be admitted into any office, civil, or military, or shall receive any pay, salary, fee or wages, by reason of any patent or grant of his majesty, or shall have command, place, or trust from or under his majesty, his heirs or successors, or by his or their authority, or by authority derived from him or them within England, Wales, or Berwick-upon-Tweed, or in his majesty's navy, or in Jersey and Guernsey, or that shall be admitted into any employment in his majesty's or royal highness's household or family, after the first day of Easter term, 1673, and shall inhabit in London or Westminster, or within thirty miles thereof, shall take the oaths of supremacy and allegiance by law established, (the latter contained in the statute of 3 Jac.,) in the *next term* after his admittance, or in case of omission to do so at the next quarter sessions for the county or place where he shall reside, and shall receive the sacrament *within three months* after his admittance."

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And by § 9, the persons taking the aforesaid oaths are likewise to make and subscribe the declaration against transubstantiation at the same time.

By statute 1 W. & M. c. 8, intituled *An Act for the abrogating of the oaths of supremacy and allegiance, and appointing other oaths*, the oaths of supremacy and allegiance appointed by the 1 Eliz. c. 1, and the 3 Jac. 1, c. 4, and also by 13 & 14 Car. 2, c. 3, are abrogated and repealed, and other forms of oath are substituted for them.

And by § 5, it is enacted, that all persons that shall thereafter be admitted into any office or employment, ecclesiastical or civil, or come into any capacity in respect whereof they should have been obliged by any statute to take the abrogated oaths, shall take the oaths thereby appointed, in such manner, at *such times*, before such persons, and in such places, as they should or ought to have taken the abrogated oaths if they had not been abrogated; and shall incur the same penalties for neglecting to do so.

With respect to this time and manner of taking the oaths, the stat. of 1 Eliz. c. 1, enacts, that any person that shall be preferred to any spiritual benefice, or temporal or lay office, service or ministry, shall take the oath of supremacy appointed by that statute *before* taking upon him such promotion, ministry, &c., and before such person shall have authority to admit any such person to any such office, ministry, or service, or else before such person as shall be appointed by her majesty's commission to minister the said oath.

But as we have seen that the same oaths are required by the statute 25 Car. 2, c. 2, to be taken in the next term, or at the next quarter sessions, after admittance into any office, it would seem as if this statute virtually repealed the provision of the 1 Eliz. requiring them to be taken *before* entering into office, as the legislature could hardly intend that the same oaths should be taken by the same individuals, both before entering into office, and also in a very few weeks afterwards. According to this construction, the time therefore for taking the new oaths under the 5th section of the 1 W. & M. c. 8, would seem to be the time appointed by the act of Charles 2, viz. in the next term, or at the next quarter sessions, after admittance to office.

And this seems the more probable, because the 10th section of the statute 1 W. & M. expressly provides with respect to commissioned and non-commissioned, or warrant-officers in the army and navy, that *they* shall take the said oaths, and make and subscribe the declaration (a) mentioned in the 30 Car. 2, stat. 2, *before* the delivery to them of their commissions or warrants.

(a) This is the greater declaration, not only against transubstantiation, but likewise against the invocation of saints and the mass.

The stat. 1 Geo. 1, stat. 2, c. 13, intituled *An Act for the further security of his majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors*, after enacting that all persons bearing offices civil or military, &c., on the first day of Michaelmas term then next, or at any time during the said term, shall take the oaths of allegiance, supremacy, and abjuration of the Pretender, therein set forth, at the time and in manner therein prescribed, further enacts, "That every person that shall be admitted into any office civil or military, or shall receive any pay, salary, &c., by reason of any patent or grant from his majesty, or that shall have any command or place of trust from or under his majesty, or by his authority, or by authority derived from him within England, (a) or in his majesty's navy, or in Jersey and Guernsey,

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or that shall be admitted into any employment in his majesty's household or family, or of his royal highness George Prince of Wales, or of her royal highness the Princess of Wales, or their issue, and all ecclesiastical persons, heads, and governors of what denomination soever, and all other members of colleges and halls in any university that are or shall be of the foundation, or that do or shall enjoy any exhibition, being of, or as soon as they shall attain the age of eighteen years, and all persons teaching or reading to pupils in any university or elsewhere, and all schoolmasters and ushers, and all preachers and teachers of separate congregations, high or chief constables, and every person who shall act as serjeant at law, councillor at law, barrister, advocate, attorney, solicitor, proctor, clerk or notary, by practising in any manner as such in any court or courts whatsoever within England, who shall after the 10th of August, 1715, be admitted into any of the before-mentioned preferments, &c., or shall come into any such capacity, or take upon him any such practice, &c., as aforesaid, shall *within three months* after admittance, take and subscribe the said oaths in one of the courts at Westminster, or at the general quarter sessions of the county or place where he shall reside."

(a) Berwick-upon-Tweed is here omitted.

By stat. 2 Geo. 2, c. 31, the provision of the last statute, as to taking the oaths within three months after admittance to office, is repealed; and the oaths are required to be taken at any time before the end of the next term, or before the next quarter sessions after the admittance to any office.

And by the 9 Geo. 2, c. 26, the time is further extended to six months after admittance to office; and all persons required by the stat. 25 Car. 2, to subscribe the declaration against transubstantiation, shall subscribe the same at the time and place of taking the oaths.

These are the statutes under which the oaths of qualification for civil and military offices were required to be taken, and which have had the effect of excluding Roman Catholics from all offices within the operation of the acts.

By a late act passed in the 57th of Geo. 3, c. 92, intituled *An Act to regulate the administration of oaths in certain cases to officers in his majesty's land and sea forces*, after reciting that by certain acts passed in previous reigns, it was provided that officers in the navy and army should take certain oaths, and make certain declarations, before entering on their offices or places of trust, and that doubts had been entertained whether such provisions were still in force; and that the practice of taking the oaths and declarations by officers previous to their receiving commissions in the army had been long disused, and that it was expedient to remove the doubts and assimilate the practice of the two services; it is enacted, that after the passing of the act, it shall be lawful for the secretaries of state, lords of the admiralty, commander-in-chief, and secretary at war, to deliver commissions or warrants to any officers in the navy, land forces, or marines, without *previously* requiring such officers to take the said oaths or declarations: Provided that nothing therein contained shall extend to any oaths or declaration required by any acts then in force, to be taken by such officers *after* they shall have received their commissions or warrants.

And by 10 Geo. 4, c. 7, § 10, (the Act for relief of the Roman Catholics,) it is enacted, "That it shall be lawful for any of his majesty's subjects professing the Roman Catholic religion to hold, exercise, and enjoy all civil and military offices, and places of trust or profit under his majesty, his heirs or

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quer, or jury court, or in any sheriff or steward court, or in any burgh court, or before the magistrates and councillors of any royal burgh in Scotland, between the hours of nine in the morning and four in the afternoon; and the proper officer of the court in which such oath shall be so taken and subscribed, shall cause the same to be preserved amongst the records of the court; and such officer shall make, sign, and deliver a certificate of such oath having been duly taken and subscribed, as often as the same shall be demanded of him, upon payment of two shillings and sixpence for the same; and such certificate shall be sufficient evidence of the person therein named having duly taken and subscribed such oath.

"And be it enacted, § 21, That if any person professing the Roman Catholic religion, shall enter upon the exercise or enjoyment of any office or place of trust or profit under his majesty, or of any other office or franchise, not having in the manner and at the times aforesaid taken and subscribed the oath hereinbefore appointed and set forth, then and in every such case such person shall forfeit to his majesty the sum of two hundred pounds; and the appointment of such person to the office, place, or franchise so by him held, shall become altogether void, and the office, place, or franchise shall be deemed and taken to be vacant to all intents and purposes whatsoever.

"Provided always, § 22, That for and notwithstanding any thing in this act contained, the oath hereinbefore appointed and set forth, shall be taken by the officers in his majesty's land and sea service, professing the Roman Catholic religion, at the same times and in the same manner as the oaths and declarations now required by law are directed to be taken, and not otherwise.

"And be it further enacted, § 23, That from and after the passing of this act, no oath or oaths shall be tendered to, or required to be taken by his majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by his majesty's other subjects; and that the oath herein appointed and set forth, being taken and subscribed in any of the courts, or before any of the persons above mentioned, shall be of the same force and effect, to all intents and purposes, as, and shall stand in the place of, all oaths and declarations required or prescribed by any law now in force for the relief of his majesty's Roman Catholic subjects, from any disabilities, incapacities, or penalties; and the proper officer of any of the courts above mentioned, in which any person professing the Roman Catholic religion shall demand to take and subscribe the oath herein appointed and set forth, is hereby authorized and required to administer the said oath to such person; and such officer shall make, sign, and deliver a certificate of such oath having been duly taken and subscribed, as often as the same shall be demanded of him, upon payment of one shilling; and such certificate shall be sufficient evidence of the person therein named having duly taken and subscribed such oath."

By § 24, it is enacted, "That if any person, after the commencement of this act, other than the person thereunto authorized by law, shall assume, use the name, style, or title of archbishop of any province, bishop of any bishopric, or dean of any deanery in England or Ireland, he shall, for every such offence, forfeit and pay the sum of one hundred pounds.

"And be it further enacted, § 25, That if any person holding any judicial or civil office, or any mayor, provost, jurat, bailiff, or other corporate officer,

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shall, after the commencement of this act, resort to or be present at any place of public meeting for religious worship in England or in Ireland other than that of the united Church of England and Ireland, or in Scotland other than that of the Church of Scotland, as by law established, in the robe, gown, or other peculiar habit of his office, or attend with the ensign or insignia, or any part thereof, of or belonging to such his office, such person shall, being thereof convicted by due course of law, forfeit such office, and pay for every such offence the sum of one hundred pounds.

“And be it further enacted, § 26, That if any Roman Catholic ecclesiastic, or any member of any of the orders, communities, or societies hereinafter mentioned, shall, after the commencement of this act, exercise any of the rites or ceremonies of the Roman Catholic religion, or wear the habits of his order, save within the usual places of worship of the Roman Catholic religion, or in private houses, such ecclesiastic or other person shall, being thereof convicted by due course of law, forfeit for every such offence the sum of fifty pounds.

“Provided always, and be it enacted, § 27, That nothing in this act contained shall in any manner repeal, alter, or affect any provision of an act made in the fifth year of his present majesty's reign, intituled *An Act to repeal so much of an act passed in the ninth year of the reign of King William the Third, as relates to burials in suppressed monasteries, abbeys, or convents in Ireland, and to make further provisions with respect to the burials in Ireland of persons dissenting from the established church*: And whereas Jesuits and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are residents within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein; be it therefore enacted, That every Jesuit and every member of any other religious order, community, or society of the Church of Rome, bound by monastic or religious vows, who at the time of the commencement of this act shall be within the United Kingdom, shall, within six calendar months after the commencement of this act, deliver to the clerk of the peace of the county or place where such person shall reside, or to his deputy, a notice or statement, in the form and containing the particulars required to be set forth in the schedule to this act annexed; which notice or statement such clerk of the peace, or his deputy, shall preserve and register amongst the records of such county or place, without any fee, and shall forthwith transmit a copy of such notice or statement to the chief secretary of the lord lieutenant, or other chief governor or governors of Ireland, if such person shall reside in Ireland, or if in Great Britain to one of his majesty's principal secretaries of state; and in case any person shall offend in the premises, he shall forfeit and pay to his majesty, for every calendar month during which he shall remain in the United Kingdom, without having delivered such notice or statement as is hereinbefore required, the sum of fifty pounds.

“And be it further enacted, That if any Jesuit, or any member of such religious order, community, or society as aforesaid, shall, after the commencement of this act, come into this realm, he shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

“Provided always, and be it further enacted, § 30, That in case any natural born subject of this realm, being at the time of the commencement of

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this act a Jesuit, or other member of any such religious order, community, or society as aforesaid, shall at the time of the commencement of this act, be out of the realm, it shall be lawful for such person to return or to come into this realm; and upon such his return or coming into this realm he is hereby required, within the space of six calendar months after his first returning or coming into the United Kingdom, to deliver such notice or statement to the clerk of the peace of the county or place where he shall reside, or his deputy, for the purpose of being so registered and transmitted, as hereinbefore directed; and in case any such person shall neglect or refuse so to do, he shall for such offence forfeit and pay to his majesty, for every calendar month during which he shall remain in the United Kingdom without having delivered such notice or statement, the sum of fifty pounds.

“Provided also, and be it further enacted, § 31, That notwithstanding any thing hereinbefore contained, it shall be lawful for any one of his majesty’s principal secretaries of state, being a protestant, by a license in writing, signed by him, to grant permission to any Jesuit, or member of any such religious order, community, or society as aforesaid, to come into the United Kingdom, and remain therein, for such period as the said secretary of state shall think proper, not exceeding in any case the space of six calendar months; and it shall also be lawful for any of his majesty’s principal secretaries of state to revoke any license so granted before the expiration of the time mentioned therein, if he shall so think fit; and if such person to whom such license shall have been granted shall not depart from the United Kingdom within twenty days after the expiration of the time mentioned in such license, or if such license shall have been revoked, then within twenty days after notice of such revocation shall have been given to him, every person so offending shall be deemed guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

“And be it further enacted, § 32, That there shall annually be laid before both houses of parliament an account of all such licenses as shall have been granted for the purpose hereinbefore mentioned within the twelve months then next preceding.

“And be it further enacted, § 33, That in case any Jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this act, within any part of the United Kingdom, admit any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer or cause to be administered, or be aiding or assisting in the administering or taking any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises in England or Ireland shall be deemed guilty of a misdemeanor, and in Scotland shall be punished by fine and imprisonment.

“And be it further enacted, § 34, That in case any person shall, after the commencement of this act, within any part of this United Kingdom, be admitted or become a Jesuit, or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

“And be it further enacted, § 35, That in case any person, sentenced and



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ordered to be banished under the provisions of this act, shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence and order, it shall be lawful for his majesty to cause such person to be conveyed to such place out of the United Kingdom as his majesty, by the advice of his privy council, shall direct.

"And be it further enacted, § 36, That if any offender, who shall be so sentenced and ordered to be banished in manner aforesaid, shall after the end of three calendar months from the time such sentence and order hath been pronounced, be at large within any part of the United Kingdom, without some lawful cause, every such offender being so at large as aforesaid, on being thereof lawfully convicted, shall be transported to such place as shall be appointed by his majesty, for the term of his natural life.

"Provided always, and be it enacted, § 37, That nothing herein contained shall extend or be construed to extend in any manner to affect any religious order, community, or establishment, consisting of females bound by religious or monastic vows.

"And be it further enacted, § 38, That all penalties imposed by this act shall and may be recovered as a debt due to his majesty, by information to be filed in the name of his majesty's attorney-general for England or for Ireland, as the case may be, in the Courts of Exchequer in England or Ireland respectively, or in the name of his majesty's advocate-general in the Court of Exchequer in Scotland.

"And be it further enacted, § 39, That this act, or any part thereof, may be repealed, altered, or varied at any time within this present session of parliament.

"And be it further enacted, § 40, That this act shall commence and take effect at the expiration of ten days from and after the passing thereof."||

4. *From living within ten Miles of London.*

By the 1 W. & M. c. 9, it is enacted, "That every justice of peace in London and Westminster, and within ten miles thereof, shall cause to be arrested and brought before him all reputed papists, (except foreigners, being merchants or menial servants to some ambassador or public agent, and except all such as used some trade, mystery, or some manual occupation at the time of the said act, in London, &c., and also all except such persons as had their dwelling in London, &c., within six months before the thirteenth of February, 1688, and no dwelling elsewhere, and certified their names to the sessions before the first of August, 1689,) and that every such justice shall tender the said declaration to every such person; and that every such person refusing the same, and afterwards remaining in London, &c., or within ten miles thereof, on being certified to the King's Bench or quarter sessions at the next term or sessions, as having refused to make the said declaration, and neglecting to make the same in such court, shall suffer as a popish recusant convict," &c.

[Repealed by 31 G. 3, c. 32, § 19, as to persons taking the oaths therein mentioned.]

5. *From keeping Arms.*

By the 1 W. & M. c. 15, it is enacted, "That any two justices of peace may and ought to tender the said declaration to any person whom they shall know or suspect, or have information of as being a papist, or suspected to be such; and that no such person so required, and not making and subscribing the said declaration, or not appearing before the said justices upon

## (C) Of the Offence in promoting or professing Popery.

notice to him given or left at his usual abode, by one authorized by warrant under the hands and seals of the said justices, shall keep any arms, or ammunition, or horse above the value of 5*l.* in his own possession, or in the possession of any other person to his use, (other than such necessary weapons as shall be allowed him by the quarter sessions for the defence of his house or person,) and that any two justices of peace, by warrant under their hands and seals, may authorize any persons in the day-time, with the assistance of the constable or his deputy, or tithing-man, to search for all such arms, &c., and horses, and seize them to the king's use; and that the said justices shall deliver the said arms and ammunition at the next quarter sessions in open court, and that whoever shall conceal, &c., or shall be aiding to the concealing any such arms or horses, shall be committed to the common jail by warrant under the hands and seals of any two justices of peace, and also forfeit treble the value; and that those who discover any such arms or ammunition, so as the same may be seized, shall have the full value thereof, to be awarded to them by the sessions, &c., and that such referees of the said declaration, &c., shall be discharged whenever they make the same."

## (C) Of the Offence in promoting or professing the Popish Religion: And herein,

1. *Of the Offence of saying or hearing Mass or other Popish Service.*

By the 23 Eliz. c. 1, § 4, it is enacted, "That every person who shall say or sing mass, being thereof lawfully convict, shall forfeit two hundred marks, and be committed to prison in the next jail, there to remain by the space of one year, and from thenceforth till he have paid the said sum of two hundred marks; and that every person who shall willingly hear mass shall forfeit the sum of one hundred marks, and suffer a year's imprisonment."

[Repealed by 31 G. 3, c. 32, as to persons taking the oaths therein appointed.]  
2 Show. 216, pl. 220.

And it is enacted by the 11 & 12 W. 3, c. 4, "That every person who shall apprehend any popish bishop, priest, or Jesuit, and prosecute him to conviction for saying mass, or exercising any other part of the function of a popish bishop or priest, shall receive 100*l.* of the sheriff; and that every such popish bishop, &c., (except, being a foreigner, he be entered in the secretary's office, and officiate only in the house of a foreign minister,) shall be adjudged to perpetual imprisonment."

[Repealed by 18 G. 3, c. 60, as to popish bishops, &c., taking the oath therein appointed before they shall have been apprehended, or any prosecution commenced against them.]

2. *Of giving or receiving Popish Education.*

To this purpose there are several statutes, and first by the 1 Jac. 1, c. 4, § 6, 7, it is enacted, "That if any person or persons under the king's obedience shall go or send, or cause to be sent, any child, or any other person under their or any of their government, beyond the seas out of the king's obedience, to the intent to enter into, or reside in, or repair to, any college, &c., of any popish order, profession, or calling, to be instructed, persuaded, or strengthened in the popish religion, or in any sort to profess the same; every such person so sending such child, &c., shall forfeit 100*l.*; and every such person so passing or being sent, &c., shall in respect of him or herself only, and not in respect of any of his heirs or posterity, be disabled to inherit, purchase, take, have, or enjoy any profits, hereditaments, chattels, debts,

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legacies, or sums of money, &c., whatsoever; and that all estates, terms, and other interests whatsoever to be made, suffered, or done, to the use or behoof of any such person, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person, shall be utterly void."

And it is further enacted by 3 Jac. 1, c. 5, § 16, "That if the children of any subject within the realm (the said children not being soldiers, mariners, merchants, or their apprentices or factors) shall be sent or go beyond sea to prevent their good education in England, or for any other cause, without the license of the king or six of his privy council, (whereof the principal secretary to be one,) under their hands and seals; that then every such child shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of or to any hereditament, or chattel, till such child being of the age of eighteen years, or above, take the oath therein mentioned before some justice of peace of the county, liberty, limit, where the parent of such child did and shall inhabit; and that in the mean time the next of kin to such child, who shall be no popish recusant, shall have the said hereditaments, &c., so given, &c., until such child shall conform, &c., and take the said oath, and receive the sacrament; and after such conformity, &c., he who hath received the profits of the said hereditaments shall account for the same, and in reasonable time make payment thereof, and restore the value of the said goods, &c.; and that whoever shall send such child over seas shall forfeit 100*l.*, which, by 11 & 12 W. 3, c. 4, § 6, shall be to the sole use and benefit of the person who shall discover the offence."

Keb. 263.

Also it is enacted by 3 Car. 1, c. 2, "That if any person under the obedience of the king shall go, or shall convey or send, or cause to be sent or conveyed, any person out of the king's dominions into any parts beyond the seas, out of the king's obedience, to the intent to enter into or be resident, or trained up in any priory, abbey, nunnery, popish university, college, or school, or house of Jesuits, priests, or in a private popish family, and shall be there by any popish person instructed, persuaded, or strengthened in the popish religion, in any sort to profess the same; or shall convey or send, or cause to be conveyed or sent, any thing towards the maintenance of any person so going or sent, and trained and instructed as is aforesaid, or under the colour of any charity towards the relief of any priory, &c., or religious house whatsoever; every person so sending, &c., any such person or thing, and every person passing or sent, being thereof convicted, &c., shall be disabled to prosecute any suit in law or equity, or to be executor or administrator to any person, or capable of any legacy or deed of gift, or to bear any office within the realm; and shall forfeit all his goods and chattels, and shall forfeit all his hereditaments, offices, and estates of freehold, during his life."

In the construction of the 3 Jac. 1, c. 5, it hath been holden, that if E T, being the king's ward of lands holden of the king by knight's-service in chief, die the king's ward, and it be found that A and B are his sisters and heirs, both of full age, and that A in the lifetime of her brother departed this realm contrary to this statute, and is a nun professed, the king may retain A's moiety in his own hands till she, according to the 1 Eliz. c. 1, take the oath of supremacy(a) required on suing out livery; for the words of the statute 3 Jac. 1, c. 5, are, *shall take no benefit by descent, &c.*, not that the party should not take by descent; and therefore the estate does not vest

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absolutely in B the sister and next heir, but her right is to the rents and profits during the non-conformity of her sister, for which in case of common lands she might enter; but in this case the king is interested, and is not obliged to give livery to the heir, till such time as the oath of supremacy be taken.

Hob. 73, 74; Ley, 59, Tredway's case. (a) Vide 5 Eliz. c. 1, § 19, and 27 Eliz. c. 12.

So if such an heir, being beyond sea, should bargain and sell his lands to a stranger, the bargain in such case will prevent the next of kin, and the bargainee may take the lands out of the hands of the next of kin, in case he had entered, for the estate never vested absolutely in such next of kin; but in such case the king may refuse to give livery sued out on such bargain in the name of the heir, except the heir himself appears and takes the oath of supremacy in his proper person.

Hob. 74, *per* Hobart.

C. Lord Gerard, in the year 1660, settled the estate in question, to the use of himself and the heirs male of his body, remainder to the heirs male of the body of Thomas first Lord Gerard, remainder to his own right heirs. Charles Lord Gerard, upon the death of Digby Lord Gerard (only son of the said C.) without issue male, entered, claiming the estate as heir male of the body of Thomas first Lord Gerard, by virtue of the said limitation in the settlement; and by virtue of this title enjoyed that estate above twenty-two years, and during the time of his enjoyment suffered several recoveries, and settled the estate upon his marriage in 1689, and died without issue in the year 1707, leaving Philip his only brother then surviving, who was heir male of the body of Thomas first Lord Gerard. Upon the death of Lord Charles, the Duchess of Hamilton claimed the estate as right heir of C. Lord Gerard, notwithstanding the estate-tail limited to the heirs male of the body of Thomas Lord Gerard subsisted in Philip, alleging, that Lord Charles and his brother Philip, being sent abroad and educated in a popish seminary, were made so utterly incapable of taking any estate that she had the right of entry in her. It was insisted for her, that the 1 Jac. 1, c. 4, § 6, had so far disabled Lord Charles to take the estate by descent, that the recovery suffered by him was void, and that the same disability being still upon Philip, and there being no person in being who could take the estate-tail, the duchess, as heir at law, must be entitled to take at present, as if the estate were actually spent. But it was resolved, that the words of the act being, that the offender shall be disabled as in respect of himself only, and not in respect of any of his heirs or posterity, to inherit, purchase, &c., this qualifies and restrains the disability; so that the act does not extend beyond the person offending, nor beyond the time of his non-conformity; so that the act hath preserved in the offender an ability to inherit, &c., for the benefit of posterity: and this act having made no application of the profits during the disability, and this being a penalty inflicted for a public offence, the king is entitled to the penalty. And to create in the offender a total disability would be very inconvenient; for in the case of an inheritance, it would be difficult to know when or in what manner the heir should take; it could not be in the life of the ancestor, for no man can be heir of a person living; and if there be a son under no disability who cannot take it, it would be merely by construction to carry the estate over his head for the benefit of a remainderman, who was not intended to take as long as there was any issue of a prior tenant in tail; and an heir can entitle himself only through his ancestors, and

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such as are inheritable; that this is not like the case of a monk, for in times of popery he was civilly dead: the 3 Jac. 1, c. 5, gives the pernancy of the profits in cases of disabilities to the next of kin, that is not a popish recusant; and R. Ow. was the next protestant of kin; the 3 Car. 1, c. 2, does not repeal the 1 Jac. 1, c. 4, but was made to explain, amend, and enforce it; the 1 Jac. 1, c. 4, was silent how the penalties of that act were to arise; the 3 Car. 1, c. 2, has provided that it shall be upon conviction, and expressly makes a forfeiture for life, and a restitution in case of conformity, in which the former act was silent; so that if the former act were to be put in execution, under the explanation of 3 Car. 1, c. 2, there being no conviction in the case, the duchess could have no title, but the land on conviction would be forfeited for life, which must be to the king.

Hill. 12 Ann. in C. B., and affirmed in the House of Lords. *Thornby v. Fleetwood*, *alias* the Duchess of Hamilton's case, Stra. 318; Comyns, 207, pl. 124; Andr. 104; 10 Mod. 113.

3. Of buying or selling Popish Books.

By the 3 Jac. 1, c. 5, § 25, it is enacted, "That no person shall bring from beyond the seas, nor shall print, buy, or sell any popish primers, ladies' psalters, manuals, rosaries, popish catechisms, missals, breviaries, portals, legends, and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in the English tongue, on pain of forfeiting forty shillings for every book, &c., and the books to be burned."

4. Of keeping School.

By 11 & 12 W. 3, c. 4, § 3, it is enacted, "That if any papist, or person making profession of the popish religion, shall be convict of keeping school, or taking upon themselves the education, or government, or boarding of youth, in any place within the realm or the dominions thereunto belonging, they shall be adjudged to perpetual imprisonment."

[Repealed by 31 G. 3, c. 32, § 13, as to persons taking the oaths and subscribing the declaration therein appointed. Roman Catholics, however, are restrained from holding the mastership of any college or school of royal foundation, or of any endowed college or school, and from keeping a school in either of the universities: neither is any Catholic school-master to educate in his school the child of any protestant father; nor is any school-master or mistress to keep a school until his or her name shall have been registered at the quarter or general sessions of the peace for the county, division, or place wherein such school shall be situated, by the clerk of the peace. § 14, 15, 16.]

5. Of withholding a competent Maintenance from a Protestant Child.

By the 11 & 12 W. 3, c. 4, it is enacted, "That if any popish parent, in order to compel a protestant child to a change of religion, shall refuse to allow such child a sufficient maintenance, suitable to the degree and ability of such parent, and to the age and education of such child, the Lord Chancellor upon complaint may make such order therein as shall be agreeable to the intent of the said act."

6. Of the Disability of those professing the Popish Religion to present to a Church.\*

By the 3 Jac. 1, c. 5, § 18, 19, 20, 21, popish recusants convict are dis-

[\* This disability from presenting to advowsons is not taken away by any of the acts which have been passed in favour of the Catholics; and it is complained of as a hardship peculiar to them, all other non-conformists, even Jews, having the full enjoyment of the right of presentation. See Mr. Butler's note on Co. Lit. 391 a.—It is indeed remarkable, that a provision so essential to the security of the establishment, and

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abled to present to a church; and by the 1 W. & M. c. 26, this disability is extended to persons refusing to make the declaration against popery mentioned in 30 Car. 2, stat. 2; and by the said statute, 1 W. & M. c. 26, § 4, it is enacted, "That if the trustee, mortgagee, or grantee of any avoidance, whereof the trust shall be for any popish recusant convict, shall present without giving notice in writing of the avoidance to the university, &c., within three months after the avoidance, he forfeits 500*l*."

Precedents of a title made under these statutes, 2 Lutw. 1101; and vide 3 Lev. 332; Lutw. 1117.

And by the 12 Ann. c. 14, this disability is extended to all persons making profession of the popish religion; to which purpose it is enacted, "That every papist, or person making profession of the popish religion, &c., and every mortgagee, trustee, or person any ways intrusted by or for such papist, &c., with or without writing, shall be disabled to present to any benefice, school, or hospital, &c., or to grant any avoidance of any benefice, prebend, or ecclesiastical living, and that in all such cases the universities shall present."

Also, by force of the said statute, "The ordinary may tender the declaration against transubstantiation to any reputed papist making a presentation, and upon a refusal to take the same, the presentation shall be void: also, the ordinary may examine every presentee upon oath, whether the person who presented him be the true patron, or only a trustee; and the court wherein a *quare impedit* shall be brought may in like manner examine the parties, and a bill may be brought in any court of equity to discover such secret trusts, &c., and the answer of such persons, upon any such examination or bill, shall be good evidence against such patron in respect of such a presentation, but not as to any other purpose."

In the construction of the 3 Jac. 1, c. 5, the following points, which are said to be likewise applicable to the 1 W. & M. c. 26, and 12 Ann. c. 14, have been holden.

Hawk. P. C. c. 15, § 8.

That where a presentment is *pro hac vice* vested in the university, by reason of the patron's being a popish recusant at the time when the church became void, it shall not be divested again by his conforming himself to the church.

10 Co. 57 b.

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to the integrity of the doctrines it maintains, should be confined only to one description of non-conformists. To leave the right of presentation in the hands of men who are inimical to our church, is, in truth, to create an interest in the church against the church. It has the pernicious tendency, too, of setting the private interests of the individual in opposition to the superior interests of the church; and of tempting the clergy to temporize with the errors of those to whom they look up for preferment. For is it probable, that a bold and honest zeal for the doctrines and discipline of our establishment will recommend to a patron who dissents from the one, or disapproves of the other? In the presence of such a person we must expect either a cold friend or a secret enemy to our church: one, who can be silent, where he ought to object; passive, when he ought to resist; or, one who can subscribe to doctrines he deems erroneous, and can pledge himself to the maintenance of a system it is his wish to subvert. By this means, the effect of those provisions which have been established for securing an orthodox clergy, and which, it is urged, render it unnecessary to lay dissenters under any restriction in this respect will, in a great measure, be done away: it is to little purpose to insist upon a profession of conformity, if we allow a temptation to schism; or to exact a vow of chastity, if we license seduction.]

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That such a patron is only disabled to present, and that he continues patron as to all other purposes, and therefore that he shall confirm the leases of the incumbent, &c.

Cawley, 230.

That such a person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years, *bond fide*, and for good consideration.

Jon. 19, 20.

That if an advowson or avoidance belonging to such a person come into the king's hands by reason of an outlawry or conviction of recusancy, &c., the king, and not the university, shall present.

Hob. 126; Winch. 7, 11; Moor, 372; Jon. 20.

On the statute 12 Ann. c. 14, it was resolved by my Lord Chancellor Talbot, in the case of Mr. Brett, who was presented by the University of Oxford to a living belonging to Mr. Fitzherbert, of Swinerton in Staffordshire, that a bill founded on this statute cannot be for relief, but only for a discovery.

[So it hath been resolved upon the same statute, that it doth not make the whole trust void, but only the turn upon an avoidance, so that if the party conforms before any avoidance happens, nothing can vest in the universities.

Cottington v. Fletcher, 2 Atk. 155.]

By the 11 Geo. 2, c. 17, reciting the 3 Jac. 1, c. 5, & 1 W. & M. c. 26, and that whereas for the better discovery of all secret trusts and fraudulent conveyances made by papists, or persons making profession of the popish religion, of their advowsons and right of presentation, nomination, and donation to any benefices or ecclesiastical livings, several provisions were made by the act 12 Ann. c. 14, which have been fraudulently evaded by persons obtaining from such papists, without a full and valuable consideration, grants of such advowsons, and right of presentation, nomination, and donation, upon confidence only that such grantees will, at the request of such papists, present to such benefices or ecclesiastical livings clerks nominated by such papists, who have been presented accordingly, contrary to the true intent and meaning of the said act, and to the great hurt of the protestant interest of this kingdom; it is therefore enacted, "That every grant to be made from and after the 6th day of May, 1738, of any advowson or right of presentation, collation, nomination, or donation of or to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, and every grant of any avoidance thereof by any papist, or person making profession of the popish religion, or any mortgagee, trustee, or person any ways intrusted directly or indirectly, mediately or immediately, by or for any such papist or person making profession of the popish religion, whether such trust be declared in writing or not, shall be null and void; unless such grant shall be made *bond fide*, and for a full and valuable consideration, to and for a protestant purchaser, and merely and only for the benefit of a protestant; and that every such grantee, or person claiming under any such grant, shall be deemed to be a trustee for a papist, or person professing the popish religion, as aforesaid, within the true intent and meaning of the said act; and that all such grantees, or persons claiming under such grants, and their presentees, shall be compelled to make such discovery relating to such grants and presentations made thereupon, and by such methods as in and by the

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said act 12 Ann. c. 14, are directed in the case of trustees of papists, or persons professing the popish religion, and that every devise to be made from and after the said sixth of May by any papist, or person professing the popish religion, of any such advowson or right of presentation, collation, nomination, or donation, or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such papist or person professing the popish religion, shall be null and void, and that all such devisees and their presentees shall, in like manner, and by such methods, be compelled to discover whether, to the best of their knowledge and belief, such devises were made with the said intent."

||By the act for relief of the Roman Catholics, 10 Geo. 4, c. 7, § 16, it is provided, that nothing therein shall enable any person, otherwise than he is by law now enabled, to exercise any right of presentation to any ecclesiastical benefice whatsoever, or repeal, vary, or alter in any manner the laws now in force in respect to the right of presentation to any ecclesiastical benefice; and by § 17, it is provided, that when any right of presentation to any ecclesiastical benefice shall belong to any office in the gift or appointment of his majesty, his heirs, &c., and such office shall be held by a person professing the Roman Catholic religion, the right of presentation shall devolve upon and be exercised by the Archbishop of Canterbury for the time being; and by § 18, it is enacted, that it shall not be lawful for any person professing the Roman Catholic religion, directly or indirectly to advise his majesty, his heirs, &c., or any persons holding the office of guardian or of regent of the United Kingdom, or the Lord Lieutenant of Ireland, touching the appointment to any office or preferment in the united Church of England and Ireland, or in the Church of Scotland; and if any person shall offend in the premises, he shall be deemed guilty of a high misdemeanor, and disabled for ever from holding any office civil or military under the crown.||

## 7. Of their Disability to purchase.

The statutes relating to estates conveyed by or to papists, and the disabilities they are under to take by purchase, &c., are the 11 & 12 W. 3, c. 4, 3 G. 1, c. 18, and 11 G. 2, c. 17.

By the 11 & 12 W. 3, c. 4, it is enacted, "That from and after the 29th day of September, which shall be in the year of our Lord, 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after he or she shall attain the age of eighteen years, take the oaths of allegiance and supremacy, and also subscribe the declaration set down and expressed in an act of parliament made the 30 Car. 2, stat. 2, intituled *An Act for the more effectual preserving the king's person and government, by disabling papists from sitting in either House of Parliament*, to be by him or her made, repeated, or subscribed in the Courts of Chancery or King's Bench, or quarter sessions of the county where such person shall reside; every such person shall, in respect of him or herself only, and not for or in respect of any of his or her heirs or posterity, be disabled or made incapable to inherit or take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed; and that during the life of such person, or until he or she do take the said oaths, and make, repeat, and subscribe the said declaration in manner as aforesaid, the next of his or her kindred, which shall be a protestant, shall



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have and enjoy the said lands, tenements, and hereditaments, without being accountable for the profits by him or her received during such enjoyment thereof as aforesaid; but in case of any wilful waste committed on the said lands, tenements, or hereditaments, by the person so having or enjoying the same, or any other, by his or her license or authority, the party disabled, his or her executors and administrators, shall and may recover treble damages for the same against the person committing such waste, his or her executors or administrators, by action of debt in any of his majesty's courts of record at Westminster; and that from and after the 10th day of April, 1700, every papist, or person making profession of the popish religion, shall be disabled, and is hereby made incapable to purchase, either in his or her own name, or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments, within the kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed: and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of April, to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions, and purposes whatsoever."

[Repealed by 18 G. 3, c. 60, as to all papists or persons professing the popish religion, claiming under titles not thencefore litigated, who within six months after the act passed, or their coming of age, should take the oath thereby prescribed.—Upon this act a case was decided in Chancery, on the 18th December, 1783, under the name of *Bunting v. Williamson*. In that case, a bill had been filed, claiming an estate given to a person professing the popish religion, by will, alleging the incapacity occasioned by the act of 11 & 12 W. 3. The testator died many years before, and after his death a suit had been instituted by another person, who claimed as his heir at law, and that suit was depending at the time when this statute of 18 G. 3 was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill, some time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act, and concluded with an averment that the title had not been before litigated by the plaintiff or any one under whom he claimed. The plaintiff, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the lords commissioners Ashurst and Hotham were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation: and the plea was allowed. Co. Lit. last edit. 391 a, note 2.—*Note*, The oath prescribed by the 18 G. 3, c. 6, and that prescribed by the 31 G. 3, c. 32, are different. As the last act was originally framed, and as it stood, when, having passed the Commons, it was brought into the House of Lords, the first clause in it directed, that the oath contained in the act of the 18th year of the reign of his present majesty should be taken no longer; but that the oath appointed by the bill should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the 18th of his present majesty. This clause was altered in the House of Lords to the form in which it now stands. It does not express that the oath contained in it shall entitle the persons taking it to the benefits of the act of the 18th of his present majesty: it only expresses, that *it shall be lawful* for Catholics to take the oath of the 31st of his present majesty at the places and times, and in manner therein mentioned. Thus, it is very uncertain, whether persons taking only the oath prescribed by the 31st of his present majesty, will be entitled to the benefit of the act of the 18th of his present majesty. It seems, therefore, advisable for every Roman Catholic, who wishes to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st, and the oath prescribed by the 18th of his present majesty. *Ibid.*] ¶ But

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this uncertainty is now removed by the 43 G. 3, c. 30, which provides, that the oath and declaration in the 31 G. 3, c. 32, shall give the same benefits and advantages to all persons taking and making the same as were by the act of the 18th of his majesty enacted and declared concerning the oath thereby prescribed.¶

By the 3 G. 1, c. 18, reciting, that some doubts have arisen upon the (a) act therein recited, as also upon one other act made and passed in the parliament held in the 11 & 12 W. 3, c. 4, intituled *An Act for the further preventing the growth of popery*; and upon another act made in the 1 Jac. 1, c. 4, for the due execution of the statutes against Jesuits, seminary priests, recusants, and other acts made against papists and popish recusants, touching the sale of the real estates of persons professing the popish religion, or incurring the disabilities and incapacities in the said acts mentioned, it is enacted, "That no sale, for a full and valuable consideration, of any manors, messuages, lands, tenements, or hereditaments, or of any interest therein, by any person or persons being reputed owner or owners, or in the possession or receipt of the rents or profits thereof, heretofore made, or hereafter to be made, to or for any protestant purchaser and purchasers, and merely and only for the benefit of protestants, shall be avoided or impeached for or by reason or upon pretence of any of the disabilities or incapacities in the said acts or any of them contained, incurred, or supposed to be incurred, by any of the persons making or joining in such sale, or by any other person or persons, from or through whom the title to such manors, &c., is or shall be derived, or supposed to be derived, unless before such sale the person entitled to take advantage of such disability or incapacity shall have recovered such manors, messuages, lands, tenements, and hereditaments by reason of such disability or incapacity, and have entered such claim in open court at the general sessions of the peace for the county, city, riding, or division wherein such manors, messuages, lands, tenements, or hereditaments lie or arise, and *bonâ fide*, and with due diligence, pursued his remedy in a proper course of justice for the recovery thereof."

(a) *Viz.*, An act passed in the sessions before, intituled *An Act to oblige papists to register their names and real estates*.

"Provided nevertheless, that whereas it was amongst other things enacted, by the said 11 & 12 W. 3, c. 4, that from and after the tenth day of April which should be in the year 1700, every papist or person making profession of the popish religion should be disabled, and was thereby made incapable to purchase, either in his or her own name, or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments, within the kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed; and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of April to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, should be utterly void and of no effect, to all intents, constructions, and purposes whatsoever: It is hereby declared and enacted, that the said recited part of the said act of parliament shall not be hereby altered or repealed, but the same shall be and remain in full force as if this act had never been made."

And it is further enacted, by the authority aforesaid, "That from and after the 29th of September, 1717, no manner of lands, tenements, hereditaments, or any interest therein, or rent or profit thereout, shall pass, alter, or change,

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from any papist, or person professing the popish religion, by any deed or will, except such deed within six months after the date, and such will within six months after the death of the testator, be enrolled in one of the king's courts of record at Westminster, or else within the same county or counties wherein the manors, lands, and tenements lie, by the *custos rotulorum* and two justices of the peace and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one."

[Repealed absolutely by 31 G. 3.]

The 11 G. 2, c. 17, reciting that "Whereas persons professing or educated in the popish religion are by divers acts of parliament subjected to several disabilities and incapacities, which may affect persons conforming from the popish to the protestant religion, and whereas many persons have already conformed to the protestant religion, and are willing to submit to his majesty's government in as full and ample manner as any other of his majesty's subjects, and others are likely so to do, it is enacted, That all and every person or persons, being reputed owner or owners, or in possession or receipt of the rents and profits of any manors, messuages, lands, tenements, or hereditaments, or of any interest therein, who having been or reputed to be a papist or papists, or educated in the popish religion, hath or have conformed to, or hereafter shall conform to and profess the protestant religion, and hath or have taken or shall take the oaths of allegiance, supremacy, and abjuration, and also subscribed or shall subscribe the declaration set down and expressed in an act of parliament made the 30th Car. 2, stat. 2, intituled *An act for the more effectual preserving the king's person and government, by disabling papists from sitting in either house of parliament*, to be by him, her, or them repeated and subscribed in the Courts of Chancery or King's Bench, or quarter sessions of the county where such person or persons shall reside, (all which shall be recorded in one of his majesty's courts of record at Westminster, or such quarter sessions as aforesaid,) and all and every person and persons conforming and performing the requisites as aforesaid, for their own benefit, or for the benefit of any other protestant or protestants, and not for the benefit of any papist or papists, shall hold, possess, and enjoy all such manors, messuages, lands, tenements, and hereditaments, freed and discharged of and from the disabilities and incapacities in the said acts or any of them contained, incurred, or supposed to be incurred, by such person or persons so reputed owner or owners, or in possession or receipt of the rents and profits as aforesaid, or by any other person or persons, by, from, or through whom the title to such manors, messuages, lands, tenements, or hereditaments, or any interest therein, was or shall be derived or supposed to be derived for such estate, right, title, or interest, as he, she, or they had or would have, if no such disability or incapacity had been incurred; unless the person or persons entitled to take advantage of such disability, incapacity, or defect of title hath or have actually and *bonâ fide* recovered, or shall hereafter recover such manors, messuages, land, tenements, hereditaments, by judgment, or decree in some action or suit already commenced, or hereafter to be commenced, six calendar months at least before the making of such record, and to be prosecuted with due diligence.

"Provided nevertheless, that this act, or any thing herein contained, shall not take away or prejudice the right of any person or persons, entitled to take advantage of such disability or incapacity, who now is or are in the

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actual possession of, or shall have, precedent to the making of such record, been in quiet possession of any such manors, messuages, lands, tenements, or hereditaments, by the space of two calendar months.

“Provided always, and it is further enacted, that if any such person or persons, so conforming as aforesaid, shall, after such conformity, return to or again profess the popish religion, every such person and persons shall for ever afterwards be disabled from, and be incapable of, having or enjoying any benefit, privilege, or advantage of this act, and shall from thenceforth be liable to the same disabilities, incapacities, and forfeitures, as if he, she, or they had not taken the said oaths and subscribed the declaration as aforesaid.

“Provided always, that nothing in this act contained shall extend to take away or prejudice the right of any person entitled to any remainder or reversion in any such manors, messuages, lands, tenements, or hereditaments, in case such person shall pursue his or her said right by some action or suit, to be commenced within the space of twelve calendar months next after the precedent estate or estates, on which such remainder or reversion depends and is expectant, shall be determined; or within twelve calendar months from and after the 29th of September, 1738, if such precedent estate or estates be already determined by the death or deaths of any person or persons whose deaths have been concealed from or not known to the person entitled to such remainder or reversion, by reason of their having been buried beyond the seas, or in a private and clandestine manner at home, and shall prosecute such action or suit with due diligence.”

On the first of these statutes there have been the following cases and resolutions :

John Roper, Esq., being seised in fee of several manors, lands, &c., by indentures of lease and release, bearing date respectively the 17th and 18th of January, 1708, granted and conveyed the same to William Constable, Richard Snow, and Daniel Hickman, and their heirs, in trust to sell the same, and out of the purchase-money and rents till sale, to pay a debt of 4000*l.* due to E and H W by mortgage of the premises, with interest, and after satisfaction thereof, then in trust for payment of the debts mentioned in the schedule annexed to the indenture of release; and the overplus of the money so to be raised, or to be paid as the said John Roper by any attested writing or by his will should appoint; and for want of such appointment, in trust for the benefit of the said John Roper and his heirs. The 5th of March, 1708, the said John Roper made his will, and after reciting the said lease and release, and the power reserved to him over the surplus of the said estate, he bequeathed several pecuniary legacies to his relations, and the residue of all his real and personal estate he gave to William Constable and Thomas Radclyffe, and to Robert Hewett and Daniel Hickman, and to their heirs and assigns for ever, and appointed them joint executors: the 1st of April, 1709, he added a codicil to his will, and thereby gave the further several legacies therein mentioned, and all the remainder, whether in lands or personal estate, he gave to his executors Mr. Radclyffe and Mr. Constable. The said John Roper died soon after; and Mr. Radclyffe and Mr. Constable brought their bill in Chancery against Edward Roper, Esq., the heir at law of the said John Roper, and also against Hickman, Hewett, Snow and others, to have the trust-estate sold, and for an account of the profits, and after the debts and legacies paid, to have the surplus money arising by sale equally divided between the plaintiffs, according to the said codicil. The said Edward Roper by his answer insisted, that as heir at law

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to the testator he was entitled to all such real estate as was undisposed of by him, and that Mr. Radclyffe and Mr. Constable were then and at the testator's decease papists, and as such, by 11 & 12 W. 3, c. 4, were incapable of purchasing any manors, lands, profits out of lands, &c. The said Hewett and Hickman by their answer insisted, that the real estate devised by the said will ought to be considered as the remaining part of the testator's lands, (after a sufficient part sold for payment of debts and legacies,) and not as a personal estate, and that so much only ought to be sold as would be sufficient to pay the debts; and that in case Mr. Radclyffe and Mr. Constable were incapable of taking them, they, as protestants, claimed the said real estate, as being the only devisees capable to take the same: they also insisted, that the codicil, with reference to the devise of the remainder of the testator's lands, did not control the devise thereof mentioned in the will; for that if the plaintiffs were incapable to take the lands as purchasers by the devise, they were to be esteemed as persons not *in esse*, and that the codicil as to the lands was void; but if the plaintiffs were capable, yet such devise did not give the remainder of the premises to them but for their lives, and that the reversion in fee belonged to them, the said Hewett and Hickman; and they brought a cross-bill, insisting thereby on the same matters; and the legatees brought a bill for payment of their legacies. The 27th of June, 1712, the said causes came on to be heard before the Lord Chancellor Harcourt, who desired to have the assistance of the judges; and a case was made and argued before my Lord Chancellor Parker, Trevor Chief Justice of C. B., Justice Powel, and the Master of the Rolls, and after time taken to consider of the case, my Lord Chancellor, Trevor, C. J., the Master of the Rolls, and Justice Powel were of opinion, that the devise of the surplus of the purchase-money (after debts and legacies paid) to Mr. Radclyffe and Mr. Constable was good, notwithstanding the said disabling act; the surplus-money being a personal interest in them, and not made void by the words or intention of that statute; and as to Hewett and Hickman, my Lord Chancellor was of opinion, that the first codicil was a revocation of the will, as to the residue of the real and personal estate. Mr. Roper appealed to the House of Lords, and it was there ordered, before the appeal was determined, that the estates should be sold, and all debts and legacies paid; which was accordingly done; but afterwards the Lords reversed the decree, principally for this reason, that (a) if the devise of the residue to the plaintiffs was good, they would in equity be entitled to pay off the antecedent debts and legacies, and when that was done, keep the estate, which would be a means of evading the statutes, and enabling a papist to take an estate contrary to the intention of them. It was also resolved, in this case, that a devise is a purchase within the meaning of the act.

Roper v. Radclyffe, Hil. 1713, in *Canc.*; 9 Mod. 181, S. C.; 1 Bro. P. C. 450, S. C. (a) But it seems, that where lands are devised to or vested in trustees, to be sold for payment of particular sums to several people, some of whom happen to be papists, that this act does not prevent such papists from taking the particular sums or legacies intended for them; because they cannot insist upon paying off the other encumbrances, and holding the estate, as a person can do to whom the residue of the purchase-money is devised. [*A fortiori* then it does not prevent a papist, who is a creditor, from receiving his debt out of money arising from the sale of an estate by the appointment of a will. Foone v. Blount, Cowp. R. 464.]

The Earl of Derwentwater was tenant in tail, with remainder in fee to himself, and intending to marry Sir John Webb's daughter, he, by advice of counsel, suffered a common recovery without declaring any uses, it being

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intended that he should thereby become tenant in fee, and be enabled to make a proper settlement. Accordingly, by indentures of lease and release, he settled his estate to the use of himself for life; remainder to trustees for preserving contingent uses; remainder in tail successively to the first and other sons of the intended marriage, with remainders over. The marriage took effect, and there was issue a son and a daughter. The said earl was attainted of high treason on account of the Preston rebellion, and was executed; and by an act made thereupon, all the forfeiting persons' lands were vested in commissioners for the use of the public; and it was expressly provided, that where the forfeiting person was seized of an estate-tail at the time of the forfeitures, the same should be vested in the commissioners as an absolute fee discharged of all remainders and reversions. The commissioners of forfeitures, on a claim exhibited before them in the name of the said earl's son, determined that the whole estate was in them on this foundation, that the earl continued tenant in tail notwithstanding the recovery, and, consequently, nothing more than estate for his own life passed by the lease and release. The reason they went upon was, that if by suffering a common recovery he could turn his estate-tail into a fee, then he would gain a new estate by purchase, which they apprehended he, being a papist, was disabled to do by the statute 11 & 12 W. 3, c. 4. But the majority of the judges, upon an appeal from the decree of the commissioners, were of a contrary opinion, and held, that this was only a new modelling of the estate, and not a purchase or acquisition within the act; and that the earl was capable of taking a new fee at least for the benefit of his heirs and posterity, and that he was capable of settling the same by lease and release; and therefore allowed of the son's claim.

*Lord Derwentwater's case*, upon an appeal to the Lords Delegates from the judgment of the Commissioners for forfeited Estates. Hil. 6 G. 1, 9 Mod. 172, S. C.

It was likewise resolved, by the delegates appointed to hear appeals from the determination of the commissioners for the estates forfeited in the year 1716, that a papist may be a trustee for a protestant, notwithstanding the statute 11 & 12 W. 3, c. 4.

Anne Stephenson had two grandchildren, one the plaintiff Hill, the other Frances the wife of the defendant Filkins, who was educated by her in the popish religion: the grandmother, by will made in the year 1716, devised the lands in question to trustees, in trust to be sold for the payment of her debts and legacies, and the residue of the money arising by such sale she devised to her said grand-daughter Frances, when she should attain her age of twenty-one years, or be married with the consent of the said trustees, and soon after died. The said Frances, at the age of fifteen, was married to Filkins according to the ceremony and usage of the Church of Rome, and a week afterward by a minister of the Church of England: at the age of eighteen she conformed according to the directions of the statute: it was held, that she was within the first clause, and that a devise to a papist under the age of eighteen is good, if he conforms within six months after he comes to that age; and the age of eighteen was a proper period for them to make their election, whether they would conform or not; and the bill exhibited by the protestant heir was dismissed with costs.

*Hill v. Filkins*, Trin. 11 G. 1, 2 P. Wms. 9, S. C.

J S, a papist, made a settlement of his estate to trustees, to the use of the trustees and their heirs, in trust for A for life; remainder to the said trustees to preserve contingent remainders; remainder to the first and every other son of A, and for default of such issue, then in trust for B and his issue. A

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was a papist and B a protestant. B exhibited his bill in Chancery, suggesting that A was a papist and had no son, and that therefore the trustees might account to him for the rents and profits; he also made the heir at law defendant; and on hearing this cause before the Lord Macclesfield, and afterwards by the Lord King, they both held, that though the trust to A was void, he being a papist, yet that notwithstanding the legal estate was still in the trustees, because they were trustees not only for the papist but also for B the protestant, and for the sons of A, who were yet unborn; and as they were trustees to preserve contingent remainders for such sons who might be protestants, they thought that the estate should remain in the trustees for that purpose: and they held that the heir at law was entitled to receive the profits during the life of A as a trust undisposed of, but that B, the remainderman, could have no right till the death of A, without a son capable of taking. And this decree was affirmed in the House of Lords.

Carriack v. Errington, Trin. 9 G. 1, in *Canc.*; 2 P. Wms. 361, S. C.; 9 Mod. 33, S. C.; 2 Eq. Abr. 623, pl. 13, 624, fol. 20, 625, pl. 21, 22, 23, S. C.

The case upon a special verdict in ejectment was: Thomas Dorrel had one brother and four sisters, and being seised in fee by will 4th December, 1703, devised the lands in question to trustees, to the use of them and their heirs, in trust for his first and every other son in tail-male; and for want of such issue, remainder to his brother Arthur for life, remainder to his first and every other son in tail-male; and for want of such issue, that then the trustees should stand and be seised for the sole and proper use and benefit of such eldest and first son lawfully begotten, or to be begotten of John Dorrel, as shall not be heir at law and inheritor to the said John Dorrel, and the heirs of his body; and for default of such issue by him, remainder to the third, fourth, and fifth, and every other son of the said John Dorrel, and the heirs of their respective bodies. The trustees, by a clause in the will, were empowered, by the rents and profits of the estate, or by mortgage and sale, to raise so much money as would satisfy the testator's debts: Thomas and Arthur both died without issue, John Dorrel is living, and has seven sons; George, the defendant, is the second son; all the sons of John are papists, and educated in the popish religion, except his youngest son, who is too young to be said, as yet, to be of any religion: George Dorrel was under eighteen years of age when the limitation by the devise fell upon him, but is now above eighteen years, and has not taken the oaths directed by 11 & 12 W. 3, c. 4, and is married, and has now two sons very young, for whom, as well as for his wife, he has made a settlement of these lands; the four sisters of Thomas Dorrel are lessors of the plaintiff, as heirs at law; and the question is, Whether George the son of Arthur, or the heirs at law, be entitled to the lands? For the plaintiffs, the heirs at law, it was urged, 1st, That George is a papist, and that papists who shall refuse above six months after they arrive at the age of eighteen to take the oaths of allegiance, &c., are by the said statute expressly disabled from purchasing; and therefore as a devise is a purchase, and so held Co. Lit. 18, and by the Lords, in the case of Roper v. Radclyffe, consequently George Dorrel takes nothing by it. 2dly, That the devise was void for uncertainty, being to such eldest and first son of J D as shall not be heir at law to him; but as no one can say who will be heir to J D, so it is impossible to say who will not, for *nemo est hæres viventis*; and he who is to be heir is not to take, so that none but a son who will not be heir can take; for both descriptions must coincide. Hob. 29, Hardwicke, C. J., breaking the case said, two objections have

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been made to the defendant's title; 1st, That the limitation under which he claims is void for the uncertainty of the description. 2dly, That supposing the description to be certain enough, yet by 11 & 12 W. 3, c. 4, the defendant is disabled from taking the estate, as being a papist. There seems at present to be a good deal of weight in the first objection, and yet it may possibly be reduced to a certainty, and if so, may be made good. And it seems natural to imagine, that by the words of the will the testator intended the second son of John Dorrel should take, and the rather as the testator has made the next limitation to the third, fourth, and fifth sons, &c., of the said John Dorrel. But if the second son cannot take, yet if the third, &c., sons are well described, the daughters of Thomas cannot recover; and at present they seem to be certainly described. As to the second objection, I think myself bound by the determination of the House of Lords in the case of Roper and Radclyffe, that the word *purchase* extends to a devise, and therefore that a papist is incapable of taking an estate by will. But yet, be the defendant's title as it will, the plaintiff must recover on his own strength, and not on the weakness of the defendant's title; and my greatest doubt is this,—the devise here is to trustees to the use of them and their heirs, &c. I think this would clearly be a devise to the use of the trustees, though the clause of raising money by rents and profits was omitted; so here is a devise to trustees, in trust not only for the second son of John Dorrel, but for all other his sons now living, one of which is not found to be a papist. It hath been said indeed, that this devise being for the benefit of papists, the trust itself is void; but the question is, if the entire trust should not be for the benefit of papists? In the present case, the youngest son of John Dorrel may be able to take, for aught appears to the contrary; and therefore I think that this latter part of the trust being lawful, will support the legal estate in the trustees. And here he put the case *supra* of Carrick v. Errington, and said, that according to the resolution in that case, the lands in question cannot be in the heirs at law, but in the trustees; because here is a trust for a son of John Dorrel, who was not a papist, as well as for other children yet unborn; so that the plaintiffs have no title to recover in this action, but have mistaken their remedy; for if they have any, it seems to be by bill in equity against the trustees for an account of the profits. And it is certain, in the above-mentioned case, that the estate could not vest in the remainder-man, because he being then in by purchase, it could never be afterwards divested for the benefit of such child as A should happen to have; but he said that he did not give this as his absolute opinion, but only to point out the difficulties which stuck with the court: it was adjourned, and no farther proceedings were had therein.

*Marwood v. Dorrel*, Hil. 8 G. 2, in B. R.; Ca. temp. Hardw. 91, S. C.

A mortgage was made to a papist, who assigned to a protestant for a full consideration: an ejectment was brought against the assignee by a subsequent mortgagee, who recovered by reason of the disability of the first mortgagee: all this appeared upon a bill brought in Chancery; and my Lord Chancellor was of opinion that a mortgage to a papist is void: but in this case the assignment to the protestant, and the trial in ejectment, were both before the 3 Geo. 1, c. 18, which, were it otherwise, would, it seems, have made an alteration.

*Pelham v. Fletcher*, Mich. 1729.

In a case which came on before my Lord King in the Court of Chancery, it appeared that my Lord Dover was possessed of a long term for years, and made his will, and his lady, who was a papist, executrix thereof. I



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was resolved by my Lord Chancellor, that notwithstanding the disabling act 11 & 12 W. 3, c. 4, the term vested absolutely in her, and that this was not a purchase within that act; and he said, that a papist may be tenant in dower, or by the curtesy; because in all these cases it is by operation of law, and not by any act of the party, that the estate comes to him.

On Lord Dover's will.

It hath been adjudged that a papist may devise to a protestant; in which case it was agreed, that where an ancestor dies siesed of an estate of inheritance, it descends upon and vests in his heir (though a papist) for the benefit of his heirs, and that the next protestant akin has only a right to the perception of the profits during the nonconformity of the heir.

Mallom v. Bringloe, Pasch. 1738, in C. B.

Upon the marriage of Mr. Paine with one Mrs. Gage, lands in the county of Surrey were settled and conveyed to the use of the husband and wife for their lives, and the life of the survivor of them; then to the use of the first and every other son in tail, remainder to the right heirs of the husband; the marriage took effect, but Mr. Paine, the husband, died in the lifetime of Mrs. Paine, without leaving issue, having first devised all his lands to his wife and her heirs. In 1730, Mrs. Paine, the wife, devised all her real estate to the defendant, subject to a few legacies mentioned in her will, but lived and died a papist; but that being difficult to prove at law, the plaintiff, Mr. Smith, who had married Eliz. Paine, heir at law to Mr. Paine, he and his wife filed their bill against the defendant to set aside the marriage settlement and will of Mr. Paine, the husband, under which Mrs. Paine claimed; and, in particular, prayed that the defendant might discover whether Mrs. Paine, the wife, under whose will he claimed, was a papist or not? To which the defendant pleaded the statute of 11 & 12 W. 3, c. 4. Upon arguing this plea, it was insisted upon for the defendant, that it was a standing rule in this court, that no person was bound to discover what might subject him to the penalty of an act of parliament; that the statute of 11 & 12 W. 3, c. 4, was a penal law, and the party, who would take advantage of such law, would never be assisted in a court of equity, which never assists a forfeiture; he, who would claim any thing forfeited, must make out the forfeiture himself; for no person shall be obliged to discover a fact that would be a forfeiture of his own estate. If a copyholder commits waste, it is a forfeiture of his estate to the lord of the manor; but if the lord of the manor comes into this court for a discovery whether the copyholder has been guilty of waste or not, the copyholder is not bound to answer; for no law in the world obliges a man to accuse himself: if an estate is given to a woman *durante viduitate*, she is not bound to discover whether she is married or not; because the discovery of that fact might be the loss of her estate. That disabilities and forfeitures were of the same nature; that a total incapacity or disability to hold at all, (which is the case of papists,) was certainly as much a penalty as a forfeiture of an estate which the party before was capable of holding; that as Mrs. Paine would not have been obliged in her lifetime to discover whether she was a papist or not, the defendant, who claims under her, ought not to be obliged to discover it. On the other hand, it was insisted by the counsel for the plaintiff, that it was not their business to examine, whether the acts of parliament made against papists were hard laws or not; they were laws, and that was sufficient for their purpose: that this was not the case of a forfeiture, but it was to discover a fact, which, if true, the estate was never in Mrs. Paine, because the

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act of parliament makes all papists absolutely incapable of being purchasers ; if she was a papist, the estate never vested in her ; and as she was not capable of holding it, she could not give it away to the defendant, therefore could never forfeit the estate ; for no person can be said to forfeit an estate he never had. An alien is incapable of holding lands at common law, yet he is obliged to discover whether he is an alien or not ; and his discovery of that fact, whether he is so or not, can never be a forfeiture of his estate, because he never had a right to it : so in case of a bastard who is *nullius filius*, and incapable of claiming lands by descent, he shall discover whether he is so or not, for the same reason : so a person claiming under a bankrupt, whose goods are vested in the assignees of the commission of bankruptcy for the benefit of creditors, must discover whether the person under whom he claims was a bankrupt or not at the time of the conveyance : That all these cases depend upon the same reason, and were no forfeitures, because the estates were never in them ; so if Mrs. Paine was a papist, she was incapable of having the estate herself, and could not give it away ; and therefore the defendant could never forfeit it, because the estate was never in him. But my Lord Hardwicke was of opinion, that the defendant was not obliged to discover whether Mrs. Paine was a papist or not ; that there is no rule better established in this court than that a man shall not be obliged to answer to what may subject him to the penalty of an act of parliament. No person can doubt whether this act is not a penal law, and whether the clauses relating to papists are not disabilities or incapacities, imposed by way of penalty upon all persons exercising that religion. It is objected, that this is not the case of a forfeiture, because the estate was never vested, and therefore can never be divested ; yet it all falls under the same reason ; and an incapacity or disability to hold at all by act of parliament is certainly as much a penalty as the forfeiture of an estate by a person who had a right to enjoy it before the forfeiture. That if a bill is brought against the person for a discovery whether he is a papist or not, he is not bound to discover ; and where is the difference between him and the person claiming under him ? Here is a disability imposed by parliament, by way of penalty, upon a particular set of men upon the account of their religion, the discovery of that fact subjects them to a penalty ; and this is not like the case of an alien or bastard, who are incapable by the general laws of the land to inherit : besides, what sways with me much, is the great inconvenience that would follow should this plea be disallowed ; we should have nothing in this court but bills of discovery, whether such and such persons were papists or not, and nobody knows what confusion would follow ; therefore the plea must be allowed. (a)

Smith v. Read, Trin. 12 G. 2, 1 Atk. 526. [(a) So in *Harrison v. Southcote*, the same plea was allowed to a bill brought against a purchaser, to discover whether the person under whom he derived title were a papist.]

[All the statutes of recusancy are now repealed by the 31 Geo. c. 32, in favour of persons taking the oaths thereby required. Nor is any Catholic to be summoned to take the oath of supremacy prescribed by 1 W. & M. § 1, c. 8, and 1 G. 1, § 2, c. 13, or the declaration against transubstantiation required by 25 Car. 2. The act dispenseth persons acting as a counsellor at law, barrister, attorney, clerk or notary, from taking the oaths of supremacy or declaration against transubstantiation. (b) It also tolerates under due regulations the public exercise of the popish religion, provides against disturbing the congregation, and misusing the officiating minister, and exempts

## Pardon.

the ministers from serving upon juries, and from ward and parochial offices. The regulations under which the public exercise of the religion is tolerated are, that no congregation for religious worship shall be had in any place with the doors locked, barred, or bolted, during any time of such meeting together; and that no congregation or assembly for religious worship shall be permitted until the place of such meeting shall be recorded at the sessions.

1 Atk. 528; 2 Ves. 389, S. C. ¶(b) But Lord C. Eldon refused to administer the oath appointed by the 31 G. 3, c. 32, to a Catholic attorney, who was appointed a *Master extra in Chancery*, on the ground that he must take the same oath as the *ordinary masters*. *Ex parte Agar*, 3 V. & B. 169.¶

As to the double land-tax, that being imposed by the annual land-tax act, a repeal of it could not be effected by any prospective act; it is repealed, by omitting from the subsequent annual land-tax acts the clause imposing it.]

## PARDON.

§ A PARDON is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 7 Pet. 160; Bouv. L. D. h. t. Pardons are general, as when an act of amnesty is passed forgiving all persons for having committed the offences therein mentioned; or special, that is when the pardon is granted to a particular individual in a certain case.

The Constitution of the United States gives to the President, in general terms, "the power to grant reprieves and pardons for offences against the United States." By the constitutions of some of the states the power of pardoning is vested in the governor alone, in others, the consent of the legislature is required.¶

- (A) By whom to be granted.
- (B) In what Cases, and for what Offences, it may be granted.
- (C) Where a Pardon is grantable of common Right.
- (D) Of the Validity of a Pardon: And herein, by what words Treason, Murder, Felony, and other Offences may be pardoned: And herein, of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.
- (E) Whether a Pardon may be conditional.
- (F) Who may take advantage of a Pardon, and to whom it shall be said to extend.
- (G) In what Manner a Pardon is to be taken Advantage of: And herein,
  - 1. *In what Manner a general Pardon by Parliament is to be taken Advantage of.*
  - 2. *In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.*
- (H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.

## (A) By whom to be granted.

THE power of pardoning offences is inseparably incident to the crown; and this high prerogative the king is intrusted with upon a special confidence that he will spare those only whose case, could it be foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case.

Show. 284.

But, it seems, that anciently the right of pardoning offences within certain districts was claimed by the Lords of Marches and others, who had *jura regalia* by ancient grants from the crown, or by prescription. But now by the 27 H. 8, c. 24, § 1, it is enacted, "That no person or persons, of what estate or degree soever they be, shall have power to pardon or remit any treasons or felonies whatsoever, nor any accessories to the same, nor any outlawries for such offences, whether committed in England or Wales, or the Marches of the same, but that the king shall have the whole and sole power and authority thereof united and knit to the imperial crown of this realm as of good right and equity it appertaineth."

Co. Lit. 114; 3 Inst. 233.

## (B) In what Cases, and for what Offences it may be granted.

It is laid down in general, that the king may pardon any offence whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over, and, consequently, may prevent a popular action on a statute, by pardoning the offence before the suit is commenced. But it seems that he cannot wholly pardon a public nuisance while it continues such, because such pardon would take away the only means of compelling a redress of it. Yet, it is said, that such a pardon will save the party from any fine to the time of the pardon.

Plow. 487; Keilw. 134; 12 Co. 29, 30; 3 Inst. 237; Vaugh. 333. *β* The Governor of North Carolina cannot constitutionally add to, or commute a punishment; but, under the power of pardoning, he may remit a part of a fine. *State v. Twitty*, 4 Hawks. 193.*γ*

But it seems agreed that the king can by no previous license, pardon, or dispensation, make an offence dispunishable which is *malum in se*; as being either against the law of nature, or so far against the public good as to be indictable at common law; and that a grant of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is plainly against reason and the common good, and therefore void.

Dav. 75, 5 Co. 35, 12 Co. 29.

And hence it hath been insisted that the king's grant to the Bishop of Salisbury and his successors, having the custody of a prison, that they should be quiet from all escapes, which hath been (*α*) adjudged to be a good grant, is not law; as being but a single instance, and contrary to this rule; because a grant of this kind tending to make a jailer less diligent in his duty, by taking off the legal punishment of his negligence, is plainly against the common good.

2 Hawk. P. C. c. 37, § 28. (*α*) 3 H. 7, 15, pl. 30.

But, where a thing in its own nature lawful, is made unlawful by parliament, as the carrying bell-metal, &c., out of the realm, importing merchandises in foreign ships, selling wines beyond a certain price, or without a license, multiplying gold, &c., coining money of a base alloy, &c., it was formerly taken as a general rule, that the king might dispense with it, as to

(B) In what Cases and for what Offences it may be granted.

a particular time or place, or person, so far as the public was concerned in it; unless such dispensation could not but be attended with an inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made; as, the licensing a particular person to import foreign cards or wines, &c.; in which cases it was commonly taken to be void. Also where a statute gives a particular interest or right of action to the party grieved, as the statutes of mortmain, (a) those against maintenance, forcible entries, carrying distresses out of the hundred, escapes, &c., it has been always agreed, that no charter from the king can bar the right of the party grounded on such statute. (b) Also where a statute is express, that the king's charter against the purport of it, though with the clause of *non obstante*, shall be void; it seems to have been always generally agreed, that regularly no such clause could dispense with it.

2 Hawk. P. C. c. 37, § 29, and several authorities there cited. [(a) By 7 & 8 W. 3, c. 38, such license may be granted by the king alone. (b) Hence, it hath been holden, that an act of grace doth not discharge the forfeiture of twenty-five pounds to the city of London, for acting as a broker without license. *Ludlam v. Lopez*, 1 Stra. 529. Neither will it discharge penalties given by a popular statute between the informer and the poor. *Howel v. James*, 2 Stra. 1272.]

Also it seems to be agreed, that no dispensation of any statute, except the statutes of mortmain, was of any force without a clause of *non obstante*; neither is such clause of any effect at this day; for it is declared and enacted by 1 W. & M. sess. 2, c. 2, that no dispensation by *non obstante* of or to any statute, or to any part thereof, be allowed; but that the same shall be held void, except a dispensation be allowed in such statute. But it is provided, that no charter, grant, or pardon, granted before 23d of October, 1699, shall be any ways invalidated by that act, but that the same shall be and remain of the same force, and no other, as if the said act had never been made.

2 Hawk. P. C. c. 37, § 30, 31.

The king can by no charter whatsoever bar any right of entry or action, or any legal interest or benefit before vested in the subject; and therefore it seems clear that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his pardon, nor a recognisance for the peace before it is forfeited.

Plow. 487; 2 Roll. Abr. 178; Cro. Car. 199; Keilw. 134.

Neither can the king pardon an appeal, except only where it is carried on at his suit, after a nonsuit; and therefore if a person attainted on an appeal carried on at the suit of the party get the king's pardon, he must sue a *scire facias* against the appellant before the pardon shall be allowed.

2 Hawk. P. C. c. 37, § 35.

And if the appellant appear on the *scire facias*, he may pray execution notwithstanding the pardon; but if the sheriff return a *scire feci*, or two *nihilis*, and the appellant appear not on demand, or if he return the appellant dead, the appellee shall be discharged. But some have holden that, in this last case, a *scire facias* shall go against the heirs of the deceased.

2 Hawk. P. C. c. 37, § 36.

But there is no need of any *scire facias* against the lord by escheat, because the pardon no way tends to reverse the attainder whereon the title of escheat is founded.

Hawk. P. C. c. 37, § 37.

If several persons be outlawed on an appeal, and one get his pardon

(B) In what Cases and for what Offences it may be granted.

allowed on the non-appearance of the appellant on a *scire facias*, it seems that the rest can take no advantage thereof, but must sue their *scire facias*, &c., in the same manner as if there had been no such default.

Hawk. P. C. c. 37, § 38.

It hath been strongly holden that the king may pardon the burning of the hand on a conviction of manslaughter on an appeal, as being no part of the judgment at the suit of the party, but a collateral and exemplary punishment inflicted by statute, and intended only by way of satisfaction to the public justice, like the finding of sureties by one convicted on the statute against trespassers in parks.

But for this vide 2 Hawk. P. C. c. 37, § 39, and 1 Stra. 530.

A pardon will not only discharge any suit in the spiritual court *ex officio*, but also any suit in such court *ad instantiam partis pro reformatione morum*, or *salute animæ*, as, for defamation or laying violent hands on a clerk, &c. And if the time to which the pardon has relation be prior to the award of the costs to the party, or, as it is generally holden, if it be subsequent to the award but prior to the taxation, it shall discharge them, but not if it be subsequent to the taxation. And the same rule holds as to costs taxed to the party grieved on a contempt in a court of equity. But *quære* as to costs taxed by the prothonotary on an attachment; for they are not given by the court of course, but the offender submits only to pay them by way of composition.

5 Co. 51; Latch. 190; Cro. Eliz. 684; Hob. 81; Cro. Ja. 335; 2 Hawk. P. C. c. 27, § 41.

If a person be imprisoned on an *excommunicato capiendo* for non-payment of costs, and the king pardon all contempts, it is said that he shall be discharged without any *scire facias* against the party, and that the party must begin anew to compel a payment of the costs; because the imprisonment was grounded on the contempt, which is wholly pardoned.

Jon. 227; 2 Roll. Abr. 178; Cro. Ja. 159; 8 Co. 68, 69.

But no pardon will discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial (a) contracts and such like. Also, it is agreed, that after costs are taxed, in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum*, or *pro salute animæ*, or for defamation, &c., they shall not be discharged by a subsequent pardon.

5 Co. 51; Latch. 190; Cro. Car. 46, 47. (a) There cannot now be any suit in the ecclesiastical courts to compel marriage by reason of any contract, &c. 26 G. 2, c. 33, § 13.

If the offence be pardoned after costs taxed, and then the defendant appeal, and the Superior Court give new costs for or against him, such costs shall not be avoided; because the costs in the first suit being taxed before the pardon, and therefore not avoided by it, the appeal was proper for determining whether they were well given or not, and, consequently, costs were as properly given on such appeal as in any other case. But if the offence be pardoned pending an appeal, and the pardon relate to a time precedent to the award of the costs, and then the appellant desert his appeal, and the court award costs against him in respect of such desertion, it seems that he may have a prohibition; because the pardon having discharged the costs of the first suit made the appeal to be of no purpose.

2 Roll. Abr. 304; Noy, 85; Latch. 155.

(C) Where a Pardon is grantable of Common Right.

By the 12 & 13 W. 3, c. 2, § 3, "No pardon under the great seal shall be pleaded to an impeachment by the Commons in parliament." (a)

[(a) As to the protests of the Commons against the power of pardon in such case, prior to the 12 & 13 W. 3, c. 2, vide Hatsell's Preced. v. 4, pp. 183, 192, 210, 277.]

[But after the impeachment is solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon.

4 Bl. Com. 392.]

(C) Where a Pardon is grantable of Common Right.

By the statute of Gloucester, c. 9, it is enacted, "That if it be found by the country, that a person tried for the death of a man did it in his defence, or by misfortune, then, by the report of the justices to the king, the king shall take him to his grace, if it please him."

2 Inst. 316.

But it seems to be settled at this day, agreeably to the ancient common law, in affirmance whereof this statute was made, that in such a case, or where one indicted of *homicide se defendendo* confesses the indictment, if the party cause the record to come into chancery, the chancellor will of course make him a pardon without speaking to the king, and that by such pardon the forfeiture of goods may be saved; for these words, *if it shall please the king*, shall be taken as spoken only by way of reverence to him, and not intended to make such a pardon discretionary. But if the party be found to have fled, it is made a *quere*, if the pardon save the forfeiture for the flight, for that is not grounded on the homicide, but on the contempt of the law.

2 Hawk. P. C. c. 37, § 2.

If an approver convict all the appellees, whether by battle or verdict, the king *ex merito justitie* ought to pardon him as to his life, and also give him his wages from the appeal to the time of the conviction.

3 Inst. 129; 2 Hal. Hist. P. C. 233.

By the 4 & 5 W. & M. c. 8, it is enacted, "That if any person or persons out of prison shall commit any robbery, and afterwards discover two or more who then had or afterwards shall commit any robbery, so as two or more of them shall be convicted, any such discoverer shall be entitled to a pardon for all robberies committed before the discovery, which also shall bar an appeal."

And by the 6 & 7 W. & M. c. 17, it is enacted, "That if any person or persons out of prison shall be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the coin of this realm, and afterwards discover two or more who then had or afterwards shall commit any of the said crimes, so as two or more of them shall be convicted, any such discoverer shall be entitled to a pardon for all his crimes committed before the discovery."

By the 10 & 11 W. 3, c. 23, (which excludes clergy from those who shall in any shop, warehouse, coach-house, or stable, privately steal any goods, &c., of the value of 5s., though such shop, &c., be not broken open, and though no person be therein; or shall assist, hire, or command any person to commit such offence,) "If any person or persons shall commit any burglary, house-breaking, or felony, in stealing of any horse or horses, or any money,

## (D) Of the Validity of a Pardon, &amp;c.

wares, or goods, from whom clergy is by that act taken away, and being out of prison shall discover two or more who then had or after shall commit any such felony, and shall be convicted thereof, or cause to be discovered and apprehended two or more who shall be convicted as aforesaid, every such discoverer shall be entitled to a pardon for the felonies aforesaid committed before such discovery," &c.

By the 5 Ann. c. 31, it is enacted, "That every person who shall be guilty of burglary, or of the felonious breaking and entering a house in the day-time, and after shall discover two who shall have committed such felony, so as they be convicted, &c., shall have 40*l.* and a pardon of all felonies except murder," &c.

[It is enacted by 8 Geo. 1, c. 18, § 7, "That if any runner of foreign goods shall within two months after his offence, and before his conviction, discover two or more of his accomplices therein to the commissioners of the customs or excise in England or Scotland, so as they or two of them at least be convicted of such offence (as described in the act), the offender or offenders so discovering shall receive the sum of 40*l.* for every such offender so discovered and convicted, so as the value of the goods recovered by such discovery shall exceed 50*l.*; and such person so discovering shall be clearly acquitted and discharged of such his or her offence." And the like is enacted by 9 Geo. 2, c. 35.

Persons to whom the king has, by special proclamation in the Gazette, or otherwise, promised a pardon, are also entitled to it of legal right.

Cowp. 333.]

(D) Of the Validity of a Pardon: And herein by what Words Treason, Murder, Felony, and other Offences may be pardoned: And herein, of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.

It is laid down as a general rule, that wherever it appears, by the recital of the pardon, that the king was misinformed, or not rightly apprized both of the heinousness of the crime and also how far the party stands convicted upon record, the pardon is void, upon a presumption that it was gained from the king by imposition.

Yelv. 43, 47; Cro. Ja. 18, 34, 548; 2 Roll. Abr. 138; Dyer, 352, pl. 26; Raym. 13; Sid. 41; 3 Inst. 238.

And upon this ground it seems agreed, that if a man attainted of felony get a pardon which doth not mention the attainder, the pardon will be ineffectual. Also it hath been holden, that the pardon of a person convicted by verdict of felony is void unless it recite the indictment and conviction. Also it hath been questioned, if the pardon of a person barely indicted of felony be good without mentioning the indictment: but it hath been adjudged, that such a defect is salved by the words *sive indictatus sive non*.

2 Hawk. P. C. c. 37, § 8.

It hath been holden, that anciently a pardon of all felonies included all treasons as well as felonies: and it seems to be taken for granted in many books, that such a general pardon is even at this day pleadable to any felony, except murder, rape, and piracy; and that the only reason why it may not also be pleaded to murder and rape is, because 13 R. 2, stat. 2, c. 1, and 16 R. 2, c. 6, require an express mention of them; and that the only reason why it is not pleadable to piracy is, because it is a felony by the civil law only.

2 Hawk. P. C. c. 37, § 9; Hal. Hist. P. C. 466; 2 Hale's Hist. P. C. 45.



## (D) Of the Validity of a Pardon, &c.

By the 27 E. 3, c. 2, it is enacted, "That in every pardon of felony granted at any man's suggestion, the suggestion and the name of him that makes it shall be comprised; and if it be found untrue the charter shall be disallowed; and the justices, before whom the charges shall be alleged, shall inquire of the same suggestion, and, if they find it untrue, shall disallow the charter."

No pardon of felony shall be carried beyond the express purport of it; and therefore if the king reciting an attainder of robbery pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it besides the execution.

6 Co. 13; 2 Hawk. P. C. c. 37, § 12. *β* A pardon by the President of the United States, after condemnation as to all the interests of the United States in the penalty incurred for a violation of the embargo laws, and directing all further proceedings on behalf of the United States to be discontinued, does not remit the interest of the custom-house officers in a moiety. *United States v. Lancaster*, 4 Wash. c. c. 64.*g*

It is enacted by 2 E. 3, c. 2, *That charters of pardon of manslaughters shall not be granted but where the king may do it by his oath, that is to say, where a man slayeth another in his own defence, or by misfortune; neither is there any precedent in the register of the pardon of any other homicide, but such as is done either in self-defence or by misadventure, or by infants or madmen; and from hence some have disputed the king's power of pardoning any other homicide. But this is contrary not only to the general tenour of the books, but also to the plain purport of 13 R. 2, stat. 2, c. 1, which, reciting that murders, treasons, and rapes, had been frequently committed because pardons had been easily granted in such cases, enacteth, "That no pardon shall be allowed for murder, or for the death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman, unless the same murder, &c., be specified in the same charter; and if the charter of the death of a man be alleged before any justices in which it is not specified that the party was murdered or slain by await, assault, or malice prepensed, the same justices shall inquire by a good inquest of the visne where the dead was slain, if he were murdered or slain by await, &c., and if they find that he was murdered or slain by await, &c., the charter shall be disallowed."*

2 E. 3, c. 2; 2 Hawk. P. C. c. 37, § 14, and several authorities there cited.

It hath been formerly often adjudged, that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*; but by W. & M. sess. 2, c. 2, it is declared, *That no dispensation by non obstante of or to any statute shall be allowed.*

*Sid.* 366; *Show.* 283; *Keling.* 24; 3 *Mod.* 37.

But pardons of manslaughter remain as they were at common law; and therefore the pardon of the felonious killing of J S may be pleaded to an indictment of manslaughter in killing him; but where such a pardon is pleaded to a coroner's inquest of manslaughter, the court may refuse to allow it till the fact be found manslaughter by a jury directed by a higher court.

2 *Keb.* 363, 415; *Keling.* 24, 2 *Jon.* 56.

If a general act expressly pardon petit treasons and except murders, it cannot be avoided by indicting a person guilty of petit treason for murder only, omitting the word *proditorie*; for the less offence being included in the greater is pardoned by the pardon of it; and therefore such an exception of murder is to be intended of such murder only as is specially so called, and doth not amount to petit treason.

*Dyer*, 50, pl. 4, 235, pl. 19, 6 Co. 13.

## (E) Whether a Pardon may be conditional.

Neither doth the exception of murder in a general act of pardon of all felonies extend to a *felo de se*; for though his offence be in strictness murder, yet in common speech, according to which statutes are commonly expounded, it is generally understood as a distinct offence, the word *murder* seeming *prima facie* to import the murder of another.

Lev. 8, 120; Sid. 150; Keb. 66, 548.

It is said, that a general act of pardon of all felonies, misdemeanors, and other things done before such a day, pardons a homicide from a wound before the day, whereof the party died not till after; because the stroke being pardoned, the effects of it are consequently pardoned.(a)

Plow. 401, Cole's case; Hal. Hist. P. C. 426; Dyer, 99, pl. 65. (a) If the felony has its commencement before the pardon takes place, but not its completion, the pardon shall operate in favour of the prisoner, as it would have done had the felony been complete before the pardon. This is the true sense of the doctrine in Cole's case. Nicholas's case, 1748, Post. 64. But, if a man gives a stroke, or poison, (which, till death ensues upon it, is only a misdemeanor,) and a pardon is granted to all misdemeanors, &c., but not of murder or poisoning, and afterwards the party dies, the felony is not pardoned. Ibid.

It is said, that a pardon of all misprisions, trespasses, offences and contempts, will pardon a contempt in making a false return, and a striking in Westminster hall, and barratry, and even a *præmunire*. Also, it is laid down in general that it will pardon any crime which is not capital.

Lev. 106; Sid. 211; 2 Mod. 52.

If A be indicted of piracy, and refusing to plead have judgment of *peine fort et dure*, and by the general pardon piracies are excepted, but the judgment of *peine fort et dure* is pardoned by the general words of all contempts; *quare* whether he may be arraigned for any other piracy; but, by the better opinion, he may be arraigned of any other piracy committed before that award.

2 Hal. Hist. P. C. 252, cited from Dyer, 308 a.

## (E) Whether a Pardon may be conditional.

It seems agreed that the king may extend his mercy on what terms he pleases, and, consequently, may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.

Co. Lit. 274 b; 2 Hawk. P. C. c. 37, § 45. β A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment. United States v. Wilson, 7 Pet. 150.g

{And if the condition is not performed, the prisoner remains in the same state in which he was at the time that pardon was granted. If sentence had been passed, and he is at large, he may be remanded under his former sentence.

Leach, 290, Patrick Madan's case; 2 Cain, 57, The People v. James.}

Also it hath been held, that in every pardon for a capital offence where the party was obliged to give security, there is a condition in law annexed to such pardon, so that if he forfeits such recognizance his pardon becomes void, and he may be taken and executed on the first judgment.(b)

Moor. pl. 662. (b) Persons pardoned of felony may be bound to their good behaviour for seven years. 5 W. & M. c. 13, which vide *post*.

— β A pardon of a person convicted of forgery and sentenced to the state or life, contained a proviso that nothing in the pardon "shall be con-

(G) In what Manner a Pardon is to be taken Advantage of.

strued so as to relieve the said A of and from the legal disabilities to him from the conviction, sentence and imprisonment, other than the said imprisonment;" this proviso is repugnant to the pardon itself, and must be rejected, and the party is freed from all legal disabilities.

The People v. Pease, 3 Johns. Cas. 333.g

(F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.

NOTWITHSTANDING all felonies are several, yet the felony of one man may be so far dependent on that of another, that the pardon of the one will necessarily enure to the benefit of the other; as, where the principal is allowed his pardon before his conviction, in which case the accessory may by a necessary consequence take benefit of it; because he cannot be arraigned till the principal is convicted.

Cro. Eliz. 30, 31; Dyer, 34, pl. 21; 2 Hawk. P. C. c. 37, § 23.

Where a man is bound to the king as surety for another's debt, it is clear that the discharge of the principal is a discharge of the surety; but where a man is bound to the king for another's performance of a future act, the discharging of the other from such future act will not discharge the surety. But *quere*, if both had been bound, and the subject no way interested in the matter.

2 Hawk. P. C. c. 37, § 23.

The pardon of A, B, and C of all felonies by them done, without adding or "any of them," is void; for it supposes them jointly guilty, and extends to none but joint felonies, whereas all felony is several in each offender, and cannot be joint.

Dyer, 34, pl. 21; 2 Hawk. P. C. c. 37, § 24.

A pardon is a deed, to the validity of which delivery is essential, and the delivery is not complete without acceptance.

United States v. Wilson, 7 Pet. 150.g

(G) In what Manner a Pardon is to be taken Advantage of: And herein,

1. *In what Manner a general Pardon by Parliament is to be taken Advantage of.*

HEREIN we must first observe a difference between a pardon by parliament and that under the great seal; that as to pardon by (a) parliament the same cannot be waived, because no one by his admittance can give the court a power to punish him where it judicially appears there is no law to do it; but a man may waive a pardon under the great seal by pleading other matter without taking any notice of it.

2 Hawk. P. C. c. 37, § 58, 59. (a) That a coronation pardon cannot be taken advantage of, unless it be taken out and pleaded under the great seal. Keb. 707.

If the body of a general act of pardon either except divers persons by name, or except all who come under a general description, as, all who adhered to J S, the court is not bound (neither ought it, as some say) to give any one the advantage of it, unless he plead it, and show, in the first case, that he is not one of the persons excepted, and in the other, that he is not included in such description; neither will it be safe for him, if he be of the same name with one of those excepted by name, to aver that he is not one of the persons excepted by name, without adding, that he is a different person from such other of the same name. But if the body of the statute except one person only, or, if it be general as to all, and afterwards some be excepted in the provisoes, it may be pleaded, as some say, without any

(G) In what Manner a Pardon is to be taken Advantage of.

averment that he who pleads it is not one of the persons excepted, &c., and the exceptions ought to be shown on the other side.

2 Hawk. P. C. c. 37, § 60, and several authorities there cited.

Also, where a general act of pardon excepts certain kinds of crimes, there is no need to aver that the crime whereof a person is indicted is not one of such excepted crimes, but the court ought judicially to take notice whether it be excepted or not.

Noy, 100, Black v. Allen; Cro. Car. 449, Moor, 630.

Also, where such a statute excepts only one particular person, it hath been said, that there is no need of an averment that a person indicted is not such person, but that the court is to take notice whether he be or not.

Cro. Eliz. 125; 2 Jon. 26.

2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.

The party, as hath been observed, must insist on the benefit of this kind of pardon; and therefore it hath been held to be error, to allow a man the benefit of a pardon under the great seal, unless he plead it.

Cro. Eliz. 153.

He who pleads such a pardon ought to produce it (a) *sub pede sigilli*; because it is presumed to be in his custody, and the property of it belongs to him. Yet, if a man pleads such pardon without producing it, it seems that the court may indulge him a farther day to put in a better plea.

2 Hawk. P. C. c. 37, § 65. {A pardon if pleaded must be averred to be under the great seal. 1 Bos. & Pul. 199, Bull v. Tilt.} (a) That it is sufficient to plead and show the exemplification of the pardon, &c., because such exemplification is expressly within the 13 Eliz. c. 6; 5 Co. 53; Carth. 138, cited.

||A pardon, if pleaded, must be averred to be under the great seal.

Bull v. Tilt, 1 Bos. & Pul. 199. || β A pardon may be accepted or refused; if the convict desires to take advantage of it, he must plead it. United States v. Wilson, 7 Pet. 150. But the court is bound to notice a pardon by act of parliament. Ibid. γ

If there be a variance between the pardon and the record of conviction, &c., yet, if there be no repugnancy to intend that the same person is meant in both, it may be supplied by a proper averment; as, if he be called J S, gentleman, in the one, and J S, yeoman, in the other; or B the father, in the one, and B the son of W, in the other; or, if the stroke which caused the death of J S, &c., be supposed to have been given, on the second of August, in the one, and on the third, in the other: also, if such variant pardon be pleaded without such averment, the court may give the party a farther day to perfect his plea.

3 Inst. 240; Keilw. 58; Roll. R. 368; Dyer, 34.

It seems that such pardon cannot be pleaded after the general issue, unless it be of a date subsequent to the pleading of it; because the making defence, without taking any notice of the pardon, seems to amount to a waiver of it. And *quare*, if a pardon can be pleaded at the same time with a general issue.

2 Hawk. P. C. c. 37, § 67.

The party is not bound to lay the stress of his case on any particular clause of the pardon, but may take advantage of the whole.

2 Hawk. P. C. c. 37, § 68.

After an amercement in the King's Bench is estreated into the Exchequer,

(H) The Effects and Consequences of a Pardon, &c.

and the party hath insisted on a pardon there, and been denied any benefit of it, he may be brought by *habeas corpus cum causa* to the King's Bench, because the record remains there, and plead his pardon; and if it be adjudged sufficient, have a *supersedeas* to the barons.

2 Hawk. P. C. c. 37, § 69.

While the statute 10 E. 3, c. 2, stood in force, no pardon of felony (a) could be allowed without a writ of allowance, testifying that the party had found sureties according to that statute. But this is now repealed by 5 & 6 W. 3, c. 13, which provides, "That the justices, before whom a pardon of felony shall be pleaded, may in discretion remand or commit the party to prison till he shall enter into a recognisance, with two sufficient sureties, for the good behaviour for any time not exceeding seven years; provided that, if such person be an infant or feme covert, it shall be sufficient to find two sureties, who shall enter into a recognisance for his or her being of the good behaviour as aforesaid." (b)

Plow. 502; Sid. 41; Raym. 13; Carth. 121. (a) But there never was any necessity for such writ upon a pardon of treason. Cro. Eliz. 814; Noy, 31. (b) There has not been any instance since this statute (as it is said) of the court's requiring recognisance for the good behaviour of a person pardoned for murder. *Rex v. Chetwynd*, 2 Stra. 1203.

The judges may insist on the usual fee of gloves, to themselves and officers, before they allow a pardon.

2 Jon. 56; Sid. 452; Keilw. 25.

Where a prisoner hath a pardon to plead, and any difficulty arise thereon, the court will of course assign him counsel. (c)

3 Inst. 29. (c) On a pardon for a misdemeanor, the defendant shall not be put to the bar, nor plead it on his knees. *Rex v. Hales*, 2 Stra. 816.—Defendant in an information for mayhem shall have the benefit of an act of grace, though he did not insist on it at his trial; but shall pay prosecutor full costs. *Rex v. Haines*, 1 Wils. 214. —[The mode of taking advantage of a pardon upon the circuits and at the Old Bailey is, to procure the king's sign manual or privy seal, signifying his majesty's intention to afford a pardon to the prisoner either absolutely or conditionally as the case may be, and directing the justices of the jail-delivery to bail him, on his entering into a recognisance to appear and plead the next general pardon that shall come out. This mandate the justices obey; taking security, if the pardon is conditional, for the performance of the stipulations on which it is granted, and afterwards issuing their warrant to the jailer for his discharge. 1 Bl. R. 479; 2 Bl. R. 797.]

(H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.

It seems agreed, that a pardon of treason or felony, even after an attainder, so far clears the party from the infamy, and all other consequences thereof, that he may have an action against any who shall afterwards call him traitor or felon; for the pardon makes him as it were a new man.

Hob. 67, 81; Moor, 863; Roll. Abr. 87; Raym. 23. A pardon remitting the convict "the residue of the punishment he was sentenced to endure," does not restore his competency as a witness; otherwise of a full pardon. *Perkins v. Stevens*, 24 Pick. 277.g

A person sentenced to the state prison for life, and afterwards pardoned, is restored to his rights and duties as a parent, and becomes entitled to the custody of his infant children who have been placed under the care of a guardian, appointed during his civil death.

In the matter of *Deming*, 10 John. 232, 483.g

(H) The Effects and Consequences of a Pardon, &c.

Also a pardon restores a man to his credit so as to enable him to be a witness ; but yet his credit must be left to the jury.

2 Hal. Hist. 278, and see tit. *Evidence*.

And it hath been admitted, that the king's pardon of the burning of the hand on a conviction of manslaughter hath the same effect, as to this purpose, as the burning would have had, which is agreed to restore the party to his credit.

2 Hawk. P. C. c. 37, § 49.

But it hath been adjudged, that a pardon is of no manner of force, as to this purpose, till it have passed the great seal.

2 Hawk. P. C. c. 37, § 50.

||Before the statutes 6 Geo. 4, c. 25, and 7 & 8 Geo. 4, c. 28, in order to prove that a witness after conviction had been restored to his competency, the general rule was, that it was necessary to produce the pardon itself under the great seal—the privy seal or sign manual being held only warrants and countermandable.

But now, by the former of these statutes, (§ 1,) it is enacted, that in all cases in which the king shall be pleased to extend his royal mercy to any offender, convicted of any felony whereby the offender is excluded from benefit of clergy, and by warrant under sign manual, countersigned by one of the secretaries of state, shall grant to the offender, either a free pardon, or a pardon on condition of transportation, imprisonment, or other punishment, the discharge of such offender out of custody in case of a free pardon, and the performance of the condition in case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony of which he has been convicted. And by the latter of these statutes, (§ 13,) this enactment is enlarged to cases where the royal mercy is extended to any offender convicted of any felony punishable with death "*or otherwise*." These statutes, it will be observed, do not extend to misdemeanors.

Russ. on Cri., vol. ii. p. 596, (2d ed.); 6 G. 4, c. 25; 7 & 8 G. 4, c. 28.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold, it was held that at the expiration of the two years the copyholder might maintain ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency under the above act, and the estate did not vest in the lord without some act done by him.

Doe d. Evans v. Evans, 5 Barn. & C. 584.

It was formerly doubted whether pardon could do more than take away the punishment, leaving the crime and its disabling consequences unre-moved.(a) But it is now settled that a pardon, whether by the king or by act of parliament, removes not only the punishment but all the legal disabilities consequent on the crime.(b)

(a) Gilb. Ev. 128; 2 Bulst. 154; Palm. 412; 1 Sid. 52. It was said *pœna potest tolli, culpa perennis erit*. (b) Hob. 67, 81; Hale, P. C., 278; Salk. 689; Lord Raym. 39; 4 Sta. Tri. 681; Ca. temp. Holt, 685; 5 Sta. Tri. 171; 2 Salk. 690; Fitzg. 107.

§ It seems that a pardon of an assault which afterwards becomes the offence of murder by the death of the party assaulted, would not operate as a pardon of the murder.

Commonwealth v. Roby, 12 Pick. 496.g

This effect will be produced by a pardon in misdemeanors as well as

(H) The Effects and Consequences of a Pardon, &c.

felonies, wherever the disability is a consequence of the judgment: but where it is declared by an act of parliament to be part of the punishment, as in the case of perjury or subornation of perjury on the 5 Eliz. c. 9, the king's pardon will not make the witness competent.

1 Ld. Raym. 257; 2 Salk. 690; Gilb. Ev. 128; Bull. N. P. 292; 5 Esp. Ca. 94. The authorities on the effect of the king's pardon, as to the restoration of competency, are all collected and commented upon with great learning by Mr. Hargrave, in the second vol. of his Juridical Arguments, p. 221. See Russ. on Cri., vol. ii. p. 596, (2d ed.)

§ A pardon does not affect or annul the second marriage of the wife of a person sentenced to the state prison for life, nor the sale of his property, by persons appointed to administer his estate, nor divest his heirs of the interest acquired in his estate, in consequence of his civil death.

In the matter of Deming, 10 John, 232, 483.

Where a prisoner convicted of larceny has been sentenced to imprisonment for a certain period, to restore the property stolen, and to pay the costs of prosecution, and the governor has pardoned him of the crime, he is not, by the pardon, entitled to his discharge on a *habeas corpus*, if he has not restored the property stolen.

Tyson's case, Whart. Dig. Criminal Law, number, 477.

A person convicted of fraudulent insolvency, and pardoned by the governor, is not entitled to his discharge from imprisonment under the insolvent laws, and, if the presumption of having concealed property still continues, he must remain in confinement under the original executions.

Bramson's case, 1 Asam. 84.g

And by 9 Geo. 4, c. 32, § 3, it is enacted, "That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted."

Where a man was convicted of grand larceny, sentenced to transportation for seven years, and confined in the hulks for that time and then discharged, it was held that his suffering seven years aboard the hulks, in execution of sentence of seven years' transportation, operated as a statute pardon, and that his having escaped twice during the confinement, for a few hours each time, did not destroy the effect of it.

Rex v. Badoock, Russ. & Ry. C. Ca. 248; and see Russ. on Cri., v. ii. 595.]

It is said that the pardon of a felony will not make an arrest for it, by one who did not know of the pardon, unlawful; because such arrests, being for the public good, are to be favoured, and therefore shall not be actionable by reason of such a pardon, as scandalous words shall be, because they deserve no favour.

Hob. 67, 82.

If a man be convicted or deprived, or otherwise punished for an offence during a session of parliament, and at the same session an act pass which pardons the offence, it seems agreed, that the conviction or deprivation, &c., are *ipso facto* avoided; because the act taking effect from the first day of the session, (a) it now appears, that the offence was pardoned at the time of the conviction, &c. Also it hath been adjudged that where an act of parliament expressly pardons such and such crimes from a certain day before the ses-

## (H) The Effects and Consequences of a Pardon, &amp;c.

sions, it thereby avoids all convictions and deprivations, and awards of costs and amerciaments, &c., for such crimes, whether such convictions, &c., were before or after the session; because it appears to be the intent of the parliament that such crimes shall no way be punished, which cannot take effect, if such convictions, &c., continue in force.

2 Hawk. P. C. c. 37, § 53. [(a) But now the act takes effect only from the day it receives the royal assent, unless another period of commencement be provided by the act, St. 33, G. 2, c. 13.]

But as no pardon from the king shall divest any interest vested in the subject, so neither shall it, without words of restitution, even divest any thing from the king. Yet, a pardon prior to a conviction shall prevent all forfeitures of lands or goods.

Lev. 8, 120; 2 Mod. 53; Saund. 362; 3 Mod. 101. [See 2 Term R. 569.]

It hath been adjudged, that the release of all judgments and executions in a general pardon extends to debts due to the king by assignment or forfeiture; and that it doth not restore them to him who assigned or forfeited them, but extinguishes them in the hands of the debtor.

Sid. 167; Saund. 362; Lev. 120.

It seems agreed, that notwithstanding the king's pardon to a simonist coming into church, contrary to the purport of 31 Eliz. c. 6, or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5 & 6 Edw. 6, c. 16, may save such clerk or officer from any criminal prosecution in respect of the corrupt bargain; yet shall it not enable the clerk to hold the church, nor the officer to retain the office, because they are absolutely disabled by statute.

Owen, 87; Hestl. 104; Co. Lit. 120; 3 Bulst. 90, 91; 3 Inst. 154.

A restitution of blood, in its true nature and extent, can only be by act of parliament; and therefore if a man attainted be pardoned by act of parliament, he is totally restored and inheritable to all persons; but if he be pardoned by charter he may thenceforth purchase lands, but cannot inherit his former relations; for the king's charter cannot alter or take away the right of others, or restore the relation that was lost.

Co. Lit. 8; Hal. Hist. P. C. 358.

If a man be attainted, and after pardoned by charter, the children born before such pardon shall not inherit; but if they fail, the children born after such pardon may inherit him; for the pardon makes him capable of new relations as well as of new purchases, though all the old legal benefits and relations are lost.

Noy, 170; Co. Lit. 391; Hal. Hist. P. C. 358.

Restitutions by parliament are of two kinds; one a restitution only in blood, which only removes a corruption thereof, but restores not to the party attain, or his heirs, the manors or honours lost by the attainer, unless it specially extend to it; the other is a general restitution, not only in blood, but to the lands, &c., of the party attain.

Hal. Hist. P. C. 358.

A restitution in blood may be special and qualified; but, generally, a restitution in blood is construed liberally and extensively.

Hal. Hist. P. C. 358.

A hath issue B a son, and is attain of treason and dies; B purchaseth lands in fee-simple; B by parliament is restored only in blood, and enabled



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as well as heir to A as to all other collateral and lineal ancestors, provided it shall not restore B to any of the lands of A forfeited by the attainder; B dies without issue; it was ruled, that the lands of B shall descend to the sisters of A, as aunts and collateral heirs of B. 1st, Because the corruption of blood by the attainder is removed by the restitution. 2dly, Although the words of the act of restitution be to restore B only as heir to A, &c., yet this doth not only remove the corruption, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes that impediment which would have hindered the descent to them.

3 Inst. 233; Hal. Hist. P. C. 358, 359.

¶The 8 Geo. 3, c. 15, (one of the statutes providing for the transportation of offenders,) provides that "*such transportation*" shall have the effect of a pardon under the great seal. To an action on a bill of exchange the defendant pleaded in bar that the plaintiff before the date of the bill had been convicted of felony and sentenced to death, that his majesty had extended his mercy to the plaintiff on condition of his being transported for life, whereupon the court gave judgment of transportation according to the form of the statute. Replication, that before the cause of action accrued the plaintiff was in due manner transported. Rejoinder, that after the plaintiff was so transported he was unlawfully at large in England. Sur-rejoinder, that before the cause of action accrued the Governor of New South Wales (being duly authorized) had remitted the remainder of the plaintiff's term of transportation, whereby the plaintiff was lawfully at large, and traversing that he was unlawfully at large. The defendant demurred to the sur-rejoinder, and on argument the case turned principally on the meaning of the word "*transportation*" in the clause of the statute which gives it the effect of a pardon. And the court held that the word meant, not merely the conveying the party to the place of transportation, but also the remaining there during the period mentioned in the sentence; and therefore that the plaintiff, not having fulfilled this condition, was still in the situation of an attainted felon, and had not regained his civil rights, either by merely being transported, or by a remission of the governor, which had not the effect of a general pardon; and judgment was given for the defendant.

8 G. 3, c. 15; Bullock v. Dodds, 2 Barn. & A. 268.]

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PATENTS FOR INVENTIONS.

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See MONOPOLY; PREROGATIVE, (F 4.); and General Index, h. t. &

## PAUPER.

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- (A) Of the Right to sue *in formâ Pauperis*, and the Manner of Admittance.
  - (B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue *in formâ Pauperis*.
  - (C) In what Cases to be so admitted.
  - (D) In what Cases to be dispaupered, and to pay Costs.
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- (A) Of the Right to sue *in formâ Pauperis*, and the Manner of Admittance.

By the 11 Hen. 7, c. 12, it is enacted in the words following, "Prayen the Commons in this present parliament assembled, that where the king our sovereign lord, of his most gracious disposition, willesh and intendeth indifferent justice to be had and ministered according to his common laws to all his true subjects, as well to the poor as rich, which poor subjects be not of ability ne power to sue according to the laws of this land, for the redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance as other causes; for remedy whereof, in the behalf of the poor persons of this land not able to sue for their remedy after the course of the common law, be it ordained and enacted, that every poor person or persons, which have or hereafter shall have cause of action or actions against any person or persons within this realm, shall have, by the discretion of the chancellor of this realm for the time being, writ or writs original and writs of *subpoena*, according to the nature of their causes, therefore nothing paying to your highness for the seals of the same, nor to any person for the writing of the same writs to be hereafter sued; and that the said chancellor for the time being shall assign such of the clerks, which shall do and use the making and writing of the same writs, to write the same ready to be sealed; and also learned counsel and attorneys for the same, without any reward taking therefore; and after the said writ or writs be returned, if it be before the king in his bench, the justices there shall assign to the same poor person or persons' counsel learned, by their discretions, which shall give their counsel, nothing taking for the same; and likewise the justices shall appoint attorney and attorneys for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same; and the same law and order shall be observed and kept of all such suits to be made afore the king's Justice of his Common Place and Barons of his Exchequer, and all other justices in the court of record where any such suit shall be."

Before a person is admitted to sue *in formâ pauperis*, he must have a counsel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cause of action: (a) he must also annex an affidavit (b) to his petition, that he is not worth 5*l.* all his debts paid, except wearing apparel and his right to the matter in question.

Lil. Reg. 633. [(a) The same is necessary to entitle prosecutors to prosecute in

(B) Whether a Defendant may be allowed to defend, as well as Plaintiff, &c:

*formâ pauperis*. 3 Burr. 1308. (b) This affidavit must be made by the party himself, not by a third person. Wilkinson v. Belsher, 2 Bro. Ch. R. 272.] {See 11 Ves. J., 49, Spencer v. Bryant.}

On a motion to dispauper a person who was plaintiff in an action because he had a living of 40*l.* per annum; Turton and Gould, Js., were against it, because he swore he was in debt more than it was worth; but Holt, C. J., differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession.

2 Salk. 507, pl. 2.

A person admitted to sue *in formâ pauperis* can only sue in that cause for which he is admitted; so that if any other cause arises, he must sue *de novo* to be admitted, *et sic toties quoties*.

Lil. Reg. 633.

[The admission in one court is not binding on the officers of another court; and therefore if an issue out of Chancery where the plaintiff had been admitted *in formâ pauperis*, comes to be tried in K. B., he must be admitted there also.

Gibson v. McCarty, Ca. temp. Hardw. 311

The admission to sue *in formâ pauperis* may be either at the commencement of the suit, or afterwards *pendente lite*.

Say, Costs, 90; 3 Wils. 24; Andr. 306; [M'Clell. & Y. 282.]

A person suing *in formâ pauperis* is not entitled to the issue-money.

Codron v. Hayman, 5 Term R. 509.]

(B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue *in formâ Pauperis*.

It seems that after the statutes which introduced costs, neither plaintiffs nor defendants could sue or defend *in formâ pauperis*: for that would be a means of depriving the other party of the costs given him by statute; and as the above-mentioned statute 11 H. 7, c. 12, enables persons only to sue as paupers; and as the statute 23 H. 8, c. 15, hereafter set forth, excepts only plaintiffs who are paupers from paying costs, it seems, that a defendant cannot be admitted in a civil action to defend as a pauper. But it hath been (a) adjudged, that a person may be admitted to defend an indictment *in formâ pauperis* for a misdemeanor, such as a conspiracy, keeping a disorderly house, &c.; for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the common law.

(a) Pasch. 9 G. 2, King v. Wright, 2 Stra. 1041.

Also by the 2 Geo. 2, c. 28, § 8, it is enacted, "That in case any person, arrested and imprisoned by virtue of any writ of *capias* or information relating to the customs, shall make affidavit before the judge or judges of such court where such action or information shall be brought, or before any other person commissioned by such court to take affidavits, that he is not worth, over and above his wearing apparel, the sum of 5*l.*, (which affidavit the said judge or judges of such court, and such person so commissioned, is and are hereby authorized and required to take,) and such person shall thereupon petition such court to be admitted to defend himself against such action or information *in formâ pauperis*, that then the judges of such court shall, according to their discretions, admit such person to defend himself against such action or information in the same manner, and with the same privileges

## (D) In what Cases to be dispaupered, and to pay Costs.

as the judges of such court are by law directed and authorized to admit poor subjects to commence actions for the recovery of their right; and for that end and purpose it shall be lawful for the judges of such courts to assign counsel learned in the law, and to appoint an attorney and clerk of such court to advise and carry on any legal defence that such person can make against such action or information; which said counsel, attorney and clerk so assigned and appointed, is and are hereby required to give his and their advice and assistance to such person, and to do their duties without fee or reward."

[A defendant upon an attachment for a contempt will not be admitted to defend *in formâ pauperis*.

Rex v. Pearson, 2 Burr. 1039.

A person convicted of perjury, and outlawed for forgery, was admitted, no cause being shown to the contrary, to plead the king's pardon *in formâ pauperis*.

Rex v. Morgan, Stra. 1214.]

||If a pauper be admitted to defend a suit in chancery *in formâ pauperis*, his solicitor can only recover of him money actually paid out of pocket for defence of the suit.

1 Car. & Pa. 533.]

## (C) In what Cases to be so admitted.

It is said that none ought to be admitted to sue *in formâ pauperis* in an action on the case for fraud.

Lil. Reg. 633, per Wild.

Also it is said that a person who sues *in formâ pauperis* ought not to have a new trial granted him; because having had once the benefit of the king's justice, he ought to acquiesce in it.(a)

Mod. 268, per North. (a) *Sed qu.* If this is not discretionary in the court, and more especially if the plaintiff will consent to pay the costs?

And it is said that paupers ought not to be admitted to remove causes out of inferior courts, but ought to satisfy themselves with the jurisdiction within which their actions properly lie.

Mod. 268, per North.

||It seems that an action for penalties is not within the statute 11 H. 7, c. 12. And if it appear that the plaintiff has no meritorious cause of action, the court will discharge an order authorizing him to sue *in formâ pauperis*; though a judge's order for that purpose must be made a rule of court before the court will entertain a motion to discharge it.

Hawes v. Johnson, 1 Younge & J. 10.]

## (D) In what Cases to be dispaupered, and to pay Costs.

By the orders of the courts, if the party admitted to sue *in formâ pauperis* give any fee or reward to his counsel or attorney, or make any contract or agreement with him, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in formâ pauperis*.

Ord. Cur. 94. {See farther title *Costs*, E. 4.}

Also if it shall be made appear to the court that any person prosecuting *in formâ pauperis* hath sold or contracted for the benefit of the suit, or any

(D) In what Cases to be dispaupered, and to pay Costs.

part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the court.

Ord. Cur. 95.

It is said that if a pauper gives notice of trial and does not proceed, he shall be dispaupered.

2 Salk. 506, pl. 1; §6 East, 505.¶

In the statute 23 H. 8, c. 15, there is a provision, "That whoever sues *in formâ pauperis* shall (a) not pay costs, but shall suffer such other punishment as the judge of the court shall think fit."

(a) Though lands descend to him after cause tried, yet he shall not pay costs. Mod. Rep. in Law and Eq. 344.

But, notwithstanding this statute, if he be dispaupered or nonsuited, the (b) usual practice is to tax the costs, and for non-payment to order him to be whipped.

2 Salk. 506, pl. 1; Style, 386. (b) But though the usual course in such cases is to tax the costs, and if not paid to whip the plaintiff, yet upon consideration of the circumstances of the case, it is in the discretion of the court to spare both. Sid. 261. And *per Holt, C. J.*, on motion to whip a pauper who had been nonsuited. There is no officer for that purpose, nor did he ever know it done. 2 Salk. 506, pl. 1. [In *Solomon v. Agnel*, Fortesc. 320, it was holden, that a pauper, though dispaupered, should not pay costs; and if taken in execution for costs he should be discharged on motion.]

A brought in a bill *formâ pauperis*, to which the defendant put in a plea and demurrer, which were both overruled; and it was insisted upon that he should have no costs, being at none: but my Lord Somers, after long debate and inquiry of all the ancient counsel and clerks, who agreed that he should have costs, ordered him his costs (c) like other suitors: for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant but to the pauper.

Abr. Eq. 125. (c) But *vide* Preced. in Chan. 219, where a pauper having a decree to recover with costs, it was held on motion *per curiam* to be unreasonable that any one should have more costs than he was out of pocket; and thereupon ordered the plaintiff and his solicitor to make oath before the Master, and what they swore they had paid, or were to pay, was to be allowed, but no farther.—Costs cannot be given against a pauper lessor of the plaintiff for not going on to trial; if vexatious, he may be dispaupered. *Nokes v. Watts*, Fort. 319; 3 Wils. 24, S. C.; 1 Stra. 420, S. C. *contr.* [Unless the pauper's conduct appears to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid of a nonsuit in a prior one for the same cause. *Winter v. Slow*, 2 Stra. 878; *Brittain v. Grenville*, Ibid. 1121; 3 Wils. 24, but where the costs of a former nonsuit in trespass were not paid, the court, though no circumstances of vexation were stated, stayed the proceedings, notwithstanding the plaintiff was a prisoner at the time of bringing the second action, and sued *in formâ pauperis*. *Weston v. Withers*, 2 Term R. 511.]—If a pauper is nonsuited, brings a second action, and recovers, the costs of the first shall not be deducted out of the recovery in the second. *Butler v. Inneys*, 2 Stra. 891. If pauper gives several notices, and does not go on to trial, the court will not restrain him from going on to trial till he has paid costs of former notices, but they will make an order to dispauper him *nisi*. *Taylor v. Lowe*, 2 Stra. 983. ¶*Doe dem. Leppingwell v. Truswell*, 6 East, 505.¶ [A person suing in equity *in formâ pauperis* shall not amend his bill by leaving out some of the defendants, *Wilkinson v. Belsher*, 2 Br. Ch. Rep. 279; or dismiss it as against some of them without payment of costs, *Pearson v. Belcher*, 3 Br. Ch. Rep. 87. Nor it seems will a party be protected by an order to sue *in formâ pauperis* from the costs of proceedings previous to the order. *Mosel*. 103.]

¶[So where a cause at suit of a pauper was made a remanet at the defendant's instance by order of *nisi prius*, and on the defendant's undertaking to pay the costs of the day, an attachment was granted against the defendant for the non-payment of costs.

*Rice v. Brown*, 1 Bos. & Pul. 39.¶

## PERJURY.

[[See RUSSELL ON CRIMES, b. 5, ch. 1, (2d ed.)]]

PERJURY by the common law seemeth to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.

Hawk. P. C. c. 69; *β*Chapman v. Gillet, 2 Conn. 40; Lyman v. Wetmore, 2 Conn. 42, note; Harden v. The State, 11 Conn. 408.*g*

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear, that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment.

Roll. Abr. 41, 57; Yelv. 72; Cro. Ja. 158; 2 Keb. 399; 3 Mod. 122; Hawk. P. C. c. 69, § 10.

For the better understanding the nature of perjury, we shall consider,

(A) What it is by the Common Law, and how restrained and punished.

(B) How restrained and punished by Statute.

[(C) How charged and assigned.]

(A) What it is by the Common Law, and how restrained and punished.

1st, It is necessary, to constitute the offence perjury, that the false oath be taken wilfully, viz., with some degree of deliberation, and not merely owing to surprise or inadvertency, or a mistake of a true state of the question.

5 Mod. 350. *β* It is perjury when one swears wilfully, absolutely, and falsely, as to a matter he believes, if he has no probable cause for believing. An oath is *wilful* when taken with deliberation without surprise, inadvertency, or a true state of the question. Commonwealth v. Cornish, 6 Binn. 249; Rex v. Pedley, 1 Leach, C. C. 325.*g*

2dly, The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the king's honour or interest are concerned; as before commissioners appointed by the king to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the king's patents. But it is not material whether the court in which a false oath is taken be a court of record or not, or whether it be a court of common law or a court of equity, or civil law, &c., or whether the oath be taken in the face of the court, or out of it before persons authorized to examine a matter depending in it, as before the sheriff on a writ of inquiry,*(a)* &c.; or whether it be taken in relation to the merits of a cause, or in a collateral matter, as where one who offers himself to be bail for another swears that his substance is greater than it is, &c. But neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, are punishable as perjury.

Hawk. P. C. c. 69, § 3, and several authorities there cited; *β*1 Term R. 69; *β*Shaffer

(A) What it is by the Common Law, and how restrained and punished.

v. Kintzer, 1 Binn. 542; Rex v. Foster, R. & R. 459; S. C. 2 Russ. C. & M. 520; Rex v. Alexander, 1 Leach, C. C. 63; Reg. v. Bishop, 1 Carr. & M. 303; Overton v. The Queen, 3 G. & D. 133.<sup>g</sup> (a) In Calliaud v. Vaughan, 1 Bos. & Pul. 210, the court threw out a doubt, whether a person could be indicted for perjury, given in evidence before a commission to examine witnesses in Scotland. And it has been doubted whether a false oath taken in Doctors' Commons, for the purpose of obtaining a marriage license, amounts to perjury. Vide Russ. on Crimes, 1755. And it has lately been decided that a false oath taken before a surrogate, in order to procure a marriage license, cannot be the subject of a prosecution for perjury; for perjury cannot be charged on an oath taken before a surrogate. And the judges were also of opinion, that as the indictment did not charge that the defendant took the oath to procure a license, or that a license was promised, no punishment at all could be inflicted. Rex v. Foster, Russ. & Ry. Ca. 459; and see Rex v. Verelst, 3 Camp. 431; and Russ. on Cri. vol. i. p. 520, (2d ed.) It seems, however, that if the purpose of the oath is to obtain a license, and the license is obtained, and marriage had, the party may be indicted for a misdemeanor. See 4 G. 4, c. 76, § 23, 24, 25, as to the forfeiture of property by the guilty party obtaining a marriage with a minor by a false oath or fraud; and see tit. *Marriage*, (C), Vol. VI. In a case where a party was indicted for perjury, in giving evidence on a trial, and it appeared that one of the two plaintiffs in the cause died after issue joined, and the other proceeded to trial, without suggesting his death, according to the stat. 8 & 9 W. 3, c. 11, Lord Ellenborough said, that the action having abated, the evidence was given in an unauthorized cause, and therefore could not amount to perjury. Rex v. Cohen, 1 Stark. R. 511; and vide Rex v. Schoole, Peake's Ca. 112. Though an affidavit cannot, by reason of certain omissions in the *jurat*, be received in evidence in the Court of Chancery for which it is sworn, yet, if it is false, the party may be indicted for perjury on it; for the perjury is complete at the time of swearing. Rex v. Hailey, Ry. & Moo. Ca. 94.¶

3dly, The oath ought to be taken before persons lawfully authorized to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having in truth no such authority, it is not punishable as perjury. Yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of such demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void.

Hawk. P. C. c. 69, § 4; β United States v. Bailey, 9 Pet. 238. See United States v. Clarke, 1 Gallis. 467; Flower v. Swift, 8 N. S. 451; Shaffer v. Kintzer, 1 Binn. 542.<sup>g</sup>

4thly, The oath ought to be taken by a person sworn to depose the truth; and therefore a false verdict comes not under the notion of a perjury, because the jurors swear not to depose the truth, but only to judge truly of the depositions of others. But a man may be as well perjured by an oath in his own cause, as in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, (a) &c., as by an oath taken by him as witness in another cause.

Hawk. P. C. c. 69, § 5. ¶(a) An attorney ordered to answer the matters of an affidavit, may be indicted for perjury committed in his affidavit in answer; and this, although the affidavit be never used. Rex v. Crossley, 7 Term R. 315.¶

5thly, It is not material, whether the thing sworn be in itself true or false, where the person who swears it in truth knows nothing of it.

Hawk. P. C. c. 39, § 6; ¶and see *per* Lawrence, J., 6 Term R. 619.¶

6thly. The oath must be taken absolutely and directly; and therefore if a man only swears as he thinks, remembers, or believes, he cannot be guilty of perjury. (b)

Hawk. P. C. c. 59, § 7. {But see 3 Wils. Works, 116; 2 W. Black, 881, Thomas Miller's case; 3 Wils. 427, S. C.; Leech, C. L. 301, Pedley's case.} ¶(b) But in Miller's case, 3 Wils. 427, 2 Black. R. 881, Lord C. J. De Grey said, that it was

## (A) What it is by the Common Law, &amp;c.

a mistake that a person could not be convicted of perjury, who swore that he *thought* or *believed* a fact to be true; for that he certainly might. And in the case of the King v. Pedley, 1 Leach, C. Ca. 367. Lord Mansfield confirmed this opinion; and the question appears to have been so decided in the C. P. in Mich. Term, 1780, when Lord Loughborough and all the other judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported on it. 2 Hawk. P. C. 98, note (a), (edit. 1795.)]

¶ An indictment for perjury cannot be sustained upon an assertion, the correctness of which depends on the construction of a deed.

Rex v. Crespigny, 1 Esp. Ca. 281.;

7thly, The thing sworn ought to be some way material; for if it be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as where a witness introduces his evidence with an impertinent preamble of a story concerning previous facts, no way relating to what is material, and is guilty of a falsity as to such facts. But it seems a reasonable opinion, (a) that a witness may be guilty of perjury in respect to a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's, where in truth the defendant never used any such mark.

Hawk. P. C. c. 39, § 8. β In an indictment for perjury before commissioners of taxes, on an appeal of H against for a surcharge of a greyhound used by H on the 24th of November, it was averred to be a material question whether a receipt for the price of the greyhound was given to the defendant on the 12th of September. When before the commissioners the defendant swore he bought the greyhound of H on the 6th of September, and had a receipt for the price before the 12th. On objection that the sale of the dog was the only material fact, that the receipt was an immaterial fact, and the 12th of September therefore an immaterial day; held, that the receipt was also material, and that it was properly laid to be a material question whether it was given on the 12th of September. Every question on cross-examination of a witness which goes to his credit, is material. Reg v. Overton, 1 Car. & M. 655.γ [(a) It is not necessary that it appear to what degree the point in which the man is perjured was material to the issue; for if it is but circumstantially material, it will be sufficient. 1 Ld. Raym. 253. Still less is it necessary that the evidence be material for the plaintiff to recover upon; for an evidence may be very material, and yet it may not be full enough to prove directly the point in question. 2 Ld. Raym. 889;] [and vide Rex v. Pepys, Peake's Ca. 138. Where a bill was filed against the defendant for specific performance of a parol agreement to purchase land, and the defendant in his answer relied on the statute of frauds, but also *denied* having entered into the agreement, it was held by Abbot, C. J. that this denial was wholly *immaterial*, and that an indictment for perjury could not be maintained upon it. Rex v. Dunston, Ry. & Moo. Ca. 109; *sed vide* Bartlett v. Pickersgill, 4 East, 577, *notā*.]

8thly, It does not seem material, whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (b)

Hawk. P. C. c. 39, § 6. ¶ (b) But a party injured by the perjury of a witness may proceed against him by action on the case for damages. *Per* Lord Ellenborough, 1 Camp. 16.¶

{ Though a plaintiff making an affidavit in a foreign country before a fo-



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reign magistrate, for the purpose of obtaining an order to hold a defendant to bail, cannot be indicted specifically for the crime of perjury in the courts of this country, yet, as far as he is punishable at all, he is punishable for a misdemeanor, in procuring the court to make an order to hold to bail by means and upon the credit of a false and fraudulent voucher of a fact, produced and published by him for that purpose.

8 East, 364, 372, *Omealy v. Newell*.}

¶ Although a person making a false affidavit of debt abroad, cannot be indicted for perjury here, yet a person knowingly making use of such affidavit is guilty of a misdemeanor in attempting to pervert public justice.

*Omealy v. Newell*, 8 East, 364.}]

¶ To constitute perjury in swearing to the plea of *non est factum*, upon a trial before a magistrate, it is necessary that the plea should be in writing and signed by the party who pleads it, as required by the acts of 1817, c. 86, s. 2, and 1819, ch. 27, s. 4.

*State v. Steele*, Yerg. 1, 394.

One may be indicted for perjury on an affidavit not signed, as if it had been signed.

*State v. Ransome*, 1 Hayw. 1.

A person who knows that a fact exists, and on oath, knowingly and with an intention to mislead, swears "that if the fact is so, he does not know it," is guilty of perjury.

*Wilson v. Nations*. 5 Yerg. 211.

If a defendant in his answer in chancery charge certain facts to exist, on which he intends to rely for defence, and swears to the answer in the ordinary form, he swears to the *truth* of the facts, and not to the *fact* of the charge; and, if the facts as charged are not true, perjury may be assigned upon it.

*Quackenbush v. Van Riper*, Sax. Ch. R. 476.

Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impair the credit of the witness, as to those parts of the case which are material to the issue, particularly if the witness be cautioned as to his answer.

*State v. Street*, 1 Murph. 124.

Perjury cannot be committed by taking a false oath in a case before a justice of the peace, where he has no jurisdiction.

*State v. Alexander*, 4 Hawks, 182. See *Commonwealth v. White*, 8 Pick. 432.

Perjury may be committed in swearing falsely to a collateral matter, with intent to prop the testimony in some other point, but such collateral matter must be material to the point in dispute.

*Studdard v. Linville*, 3 Hawks, 474.

A mere voluntary oath does not amount to perjury, as where a witness swore before a justice that he attended a certain number of days as a witness in court.

*State v. Wyatt*, 2 Hayw. 56.

Where by an act of the legislature, oaths are prescribed, and false swearing in taking them is declared perjury, and by a subsequent act the original act is amended and the forms of the oaths are altered, false swearing under

## (B) How restrained and punished by Statute.

the amendment is perjury, although it be not so expressly declared in the amended act.

Campbell v. The People, 8 Wend. 636.

A person cannot be punished for perjury in New York, although he may have sworn falsely out of the state of New York before a judge of that state.

Jackson v. Humphrey, 1 Johns. 498.

The denial in an answer in chancery of the statement in the bill, if wilfully false, amounts to perjury.

Reg. v. Yates, 1 Car. & M. 132.

But perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the statute of frauds.

Rex v. Benesech, Peake's Add. Cas. 93.g

## (B) How restrained and punished by Statute.

By the 5 Eliz. c. 9,(a) it is enacted, "That whoever shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury in any matter or cause whatsoever depending in suit or variance by any writ, action, bill, complaint, or information in anywise, concerning any lands, tenements, hereditaments, or goods, chattels, debts, or damages in any of the queen's courts of Chancery, Whitehall, or elsewhere, within any of the queen's dominions of England and Wales, or the marches of the same, where any person or persons shall have authority by virtue of the queen's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter or witnesses concerning the title, right, or interest of any lands or tenements, or hereditaments, or in any of the king's courts of record, or in any leet, view of frankpledge, or law, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of Devon or Cornwall; or shall unlawfully and corruptly procure or suborn any witness or witnesses, who shall be sworn to testify *in perpetuum rei memoriam*, shall for such offence, being thereof lawfully convicted or attainted, forfeit the sum of 40*l*. And if any such offender, so being convicted or attainted, shall not have any goods or chattels, lands or tenements, to the value of 40*l*., that then every such person shall suffer imprisonment by the space of one half year, without bail or mainprise, and stand upon the pillory the space of one whole hour, in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

[(a) Made perpetual by 29 Eliz. c. 5, § 2, and 21 Ja. 1, c. 28, § 8.] (b) At common law, perjury is a felony punishable with death. Hooper v. The State, 5 Yerg. 432.g [The judgment for the pillory need not specify the time when it is to be executed. Rex v. Atkinson, Dom. Proc. July 1, 1785.]

And § 5, it is further enacted, "That no person, being so convicted or attainted, shall from thenceforth be received as a witness in any court of record in any of the king's dominions of England, Wales, or the marches of the same, till such judgment against him shall be reversed by attain, or otherwise, and that upon every such reversal the party grieved shall recover damages against the party who did procure the said judgment so reversed to be first given."

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And § 6, it is farther enacted, "That if any person or persons shall either by the subornation, unlawful procurement, sinister persuasion, or means of any other, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury by his or their deposition in any of the courts before mentioned, or being examined *in perpetuam rei memoriam*, that then every such offender being duly convicted or attainted shall forfeit 20*l.* and have imprisonment by the space of six months, without bail or mainprise, and the oath of such offender shall not from thenceforth be received in any court of record in England or Wales, until such judgment shall be reversed, &c., on which reversal the party grieved shall recover damages in the manner before mentioned."

And § 7, it is farther enacted, "That if such offender shall not have goods or chattels to the value of 20*l.*, that then such person shall be set on the pillory in some market-place within the shire, city, or borough where the offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the head officer of such city, &c., where he shall have both ears nailed."

And § 8 & 9, it is farther enacted, "That one moiety of the said forfeitures shall be to the king, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before mentioned, that will sue for the same, &c., and that as well the judge and judges of every such of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and jail-delivery, and justices of peace at their quarter session both within the liberties and without, may inquire of, hear, and determine all offences against the said act."

But it is provided, § 11, "That the said act shall no way extend to any spiritual or ecclesiastical court, but that every such offender as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said courts."

Provided also, § 13, "That the said statute shall not restrain the authority of any judge having (a) absolute power to punish perjury before the making thereof, but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said act."

(a) And there the Court of King's Bench, &c., proceeding upon an indictment or information of perjury, or subornation of perjury at common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any inquiry concerning the value of his lands or goods. Hawk. P. C. c. 69, § 16.

In the construction of this statute the following opinions have been holden:

That every indictment or action on this statute must exactly pursue the words of it; and therefore, if it allege that the defendant deposed such a matter *falso et deceptivè*, or *falso et corruptè*, or *falso et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude, that *sic voluntarium et corruptum commisit perjurium contra formam statuti*, &c. Also, it is (b) said to be necessary expressly to show that the defendant was sworn; and that it is not sufficient to say, that *tacto per se sacro Evangelio deposuit*.

Cro. Eliz. 147; Hedl. 12; Savil, 43; 2 Leon. 211; 3 Leon. 230; Show. 190; Holt, 534, pl. 1; Skin. 403, pl. 39. (b) Cro. Eliz. 105.

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But there is no need to show whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, *If persons by subornation, &c., or their own act, &c., shall commit wilful perjury*, for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and therefore operate nothing.

## 3 Bulst. 147.

It hath been adjudged, that a man cannot be guilty of perjury within this statute in any case wherein he may not possibly be guilty of subornation of perjury within it; for it is reasonable to give the whole statute the same construction; neither can it be well intended that the makers of the statute meant to extend its purview (a) farther as to perjury, which they seem to esteem the less crime, than to subornation of perjury, which they seem to esteem the greater; and therefore since the clause concerning the subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., extends not to perjury or an indictment or criminal information; the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. Also, since the clause concerning subornation of perjury relates only to perjury by witnesses, that concerning perjury shall extend only to the like perjury; and therefore not to perjury in an answer in Chancery, or in swearing the peace against a man, or in a presentment by a homager in a court-baron, or in a wager of law, or in swearing before commissioners of inquiry of the king's title to lands; and, by the opinions of some, a false affidavit against a man in a court of justice is not within the statute. But if such affidavit be by a third person, and relate to a cause depending in suit before the court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may strongly be argued that it is within the purview of the statute. Also, it seems the better opinion, that a false oath before the sheriff on a writ of inquiry of damages is within the statute.

5 Co. 99; Cro. Ja. 120; 3 Inst. 164; 2 Leon. 201; Yelv. 120; Cro. Eliz. 148; 2 Roll. Abr. 77. (a) See observ. on st. 71.

It hath been collected from the clause which gives an action to the party grieved, that no false oath is within the statute, which doth not give some person a just cause of complaint; and therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's want of evidence to prove the truth. Also, upon the same ground, no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it; and therefore, in every prosecution on the statute, you must set forth the record wherein you suppose the perjury to have been committed, and must prove at the trial that there is such a record, either by actually producing it, or an attested copy; and in the pleadings you must not only set forth the point wherein the false oath was taken, but must also show how it conduced to the proof or disproof of the matter in question; and if an action on the statute be brought by more than one, you must show how the perjury was prejudicial to each of the plaintiffs. But it seems that a perjury which tends only to aggravate or extenuate the damages is as much within the statute as a perjury that goes directly to the point in issue; and a perjury

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in a cause wherein an erroneous judgment is given is a good ground of a prosecution upon the statute till the judgment be reversed.

Hawk. P. C. c. 69, § 22, and several authorities there cited.

If perjury be committed that is within this statute, but concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute.

2 Hal. Hist. P. C. 191, 192.

By the 2 Geo. 2, c. 25, § 2, the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, it is enacted, "That, besides the punishment(a) already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper; and therefore judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be transported as aforesaid, such person being lawfully convicted shall suffer death as a felon without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

[(a) The st. 18 G. 2, c. 18, subjects persons guilty of perjury in falsely taking the freeholders' oath at elections, to the pains and penalties imposed by the 5 Eliz. c. 9, and by the 2 G. 2, c. 25; and it has been decided that this provision makes the punishment cumulative, and that the party is to be sentenced under both the acts. *Rex v. Price*, 6 East, 323.]

[By 12 Geo. 1, c. 29, § 4, "If any person who shall be convicted of wilful and corrupt perjury, or subornation of perjury, shall act or practise as an attorney or solicitor, or agent in any suit or action, in any court of law or equity in England, the judge or judges of the court where such suit or action shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open court, and if it shall appear to the satisfaction of such judge or judges, that the party hath offended contrary to this act, such judge or judges shall cause such offender to be transported for seven years."

By 8 Geo. 1, c. 6, [an Act for giving the effect of an oath to the affirmation of Quakers,] "If any person making such affirmation or declaration as is appointed by this act shall be lawfully convicted of wilful, false, and corrupt affirming and declaring any matter or thing, which, if sworn in the common or usual form, would have amounted to wilful and corrupt perjury; every person so offending shall incur such and the same pains, penalties, and forfeitures as are inflicted or enacted by the laws against persons convicted of wilful and corrupt perjury."

[Vide 22 G. 2, c. 46.]

By 31 Geo. 2, c. 10, § 24, "Whoever shall willingly and knowingly take

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a false oath, or procure any person to take a false oath, to obtain the probate of any will or wills, or to obtain letters of administration in order to obtain the payment of any wages, pay, or other allowances of money or prize-money, due, or that were supposed to be due to any officer, seaman, or other person entitled, or supposed to be entitled to any wages, pay, or other allowances of money or prize-money, for service due on board of any ship or vessel of his majesty, &c., or the executor, administrator, wife, relation, or creditor of any such officer or seaman, or other person who has really served, or was supposed to have served on board any ship or vessel of his majesty, &c., shall be deemed guilty of felony, and suffer death without benefit of clergy."

And by 28 Geo. 2, c. 13, § 14, for the relief of insolvent debtors, "If any sheriff or other officer perjure himself in taking the oaths directed by the act, he shall forfeit 500*l*. And if the offence be committed by a prisoner or other person enabled and intending to take the benefit of the act, it is felony without benefit of clergy."

The better to prevent great offenders from escaping punishment by reason of the expense attending prosecutions, it is enacted by 23 Geo. 2, c. 11, § 3, "That it shall be lawful for any of his majesty's justices of assize, or *nisi prius*, or general jail-delivery, or any of the great sessions of Wales, or of the counties palatine, and they are hereby authorized (sitting the court, or within twenty-four hours after) to direct any person, examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty without any fee, gratuity, or reward for the same." Such prosecution is also exempt from tax or duty and fees of court, and the clerk of the assize is ordered to give the prosecutor a certificate of the same, being directed, with the names of the counsel assigned; which certificate is to be deemed sufficient proof of such prosecution having been directed, but no such direction or certificate is to be given in evidence upon the trial of the person against whom the prosecution is directed.]

||A variety of statutes impose the penalties of perjury on persons falsely swearing in affidavits, depositions, evidence, &c., in numerous cases where such false swearing might not amount to the crime of perjury at common law. Some of the principal of these statutes are the 48 Geo. 3, c. 142, § 26; 52 Geo. 3, c. 129, § 7, enabling the commissioners of the national debt to grant life annuities. 51 Geo. 3, c. 15, respecting an issue of exchequer bills to commissioners. 6 Geo. 4, c. 106, § 31, as to the management of the customs. The 46 Geo. 3, c. 112, § 3, contains a general provision applicable to all oaths relating to the duties of excise. The statute 49 Geo. 3, c. 46, § 2, relating to oaths before officers of customs in America and the West Indies. 43 Geo. 3, c. 56, for regulating foreign passage vessels. 55 Geo. 3, c. 184, § 53, contains a general provision as to oaths relating to the stamp duties. 39 & 40 Geo. 3, c. 89, for preventing embezzlement of naval stores. 55 Geo. 3, c. 157, § 8, as to oaths before commissioners appointed by the Irish courts for taking affidavits. 55 Geo. 3, c. 60, relating to execution of letters of attorney, and wills of seamen, &c. 57 Geo. 3, c. 127, § 4, as to obtaining probates in order to receive prize-money,—the annual Mutiny Acts. The 22 Geo. 2, c. 33, § 17, as to naval

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courts martial. The 45 Geo. 3, c. 10, § 37, and 46 Geo. 3, c. 98, § 10, as to quarantine. The 48 Geo. 3, c. 104, pilot act. The 46 Geo. 3, c. 52, § 16, the slave-trade act. 50 Geo. 3, c. 65, § 11, relating to the woods and land revenues of the crown. The general enclosure act, 41 Geo. 3, c. 109. The Yorkshire registry acts, 2 & 3 Ann. c. 4, § 19; 5 & 6 Ann. c. 18; 8 Geo. 2, c. 6, § 33; and the Middlesex registry act, 7 Ann. c. 20, § 15. The election bribery acts, 2 Geo. 2, c. 24, § 5, and 18 Geo. 2, c. 18, § 1. The 10 Geo. 3, c. 16, as to trial of controverted elections before committees of the House of Commons. The 6 Geo. 4, c. 16, § 99, as to oaths of bankrupts or creditors before commissioners of bankrupt. The insolvent debtors' act, 7 Geo. 4, c. 57, § 71. The 1 & 2 Geo. 4, as to oaths relating to East India prize-money. 6 Geo. 4, c. 78, § 29, as to oaths touching quarantine. 4 Geo. 4, c. 41, § 47, as to oaths relating to registering vessels. The 5 Geo. 4, c. 113, § 41, as to oaths under the slave-trade act; and various other statutes of limited and local operation.

Vide Russell on Crimes, vol. ii. 533, (2d ed.)]

§ The act of Congress entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes, passed March 3, 1825, provides, § 13, That, if any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person, so offending, shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labour, not exceeding five years, according to the aggravation of the offence. And if any person or persons shall knowingly or willingly procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labour, not exceeding five years, according to the aggravation of the offence."

{An indictment at common law for perjury in an affidavit sworn before the court need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. The crime was complete by his swearing to the affidavit, and cannot depend on the subsequent use of it.

7 Term. 315, *The King v. Crossley*.}

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By 23 G. 2, c. 11, "In every information or indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, (averring (a) such court, or person or persons, to have a competent authority to administer the same,) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceeding, either in law or equity, other than as aforesaid; and without setting forth the (b) commission or authority of the court, or person or persons before whom the perjury was assigned."

23 G. 2, c. 11. (a) Before the passing of this act, this averment seems not to have  
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## (C) How charged and assigned.

been made, Dougl. 156. (b) *Rex v. Dowlin*, 5 Term R. 317. If, however, the prosecutor undertakes to set out in the indictment more of the proceedings than he need under this act, he must set them forth correctly. *Ibid.*

And by § 2, "In every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the injury was committed, or was agreed or promised to be committed."

[Vide, as to the form of the indictment, the evidence, trial, and punishment, Russ. on Cr. v. ii. 533; and *seq.* (2 ed.)]

¶ The act of Congress, April 30, 1790, contains nearly similar provisions in the following words: § 19. "That in every presentment or indictment, to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath or affirmation was taken, (averring such court, or person or persons, to have a competent authority to administer the same,) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons, before whom the perjury was committed.

§ 20. "That in every presentment or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed."g

The fact in the affidavit in which the defendant was charged to have perjured himself was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence *per* quarter, beyond the price he actually paid *for* any malt or grain purchased by him for the said commissioners as their corn-factor: the assignment in the indictment to falsify this alleged that the defendant did charge more than sixpence *per* quarter *for and in respect of* such malt and grain so purchased. It was objected, that the words *in respect of* may include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and bearing that sense, the defendant was not guilty of perjury. This objection however was overruled.

*Rex v. Atkinson*, Dom. Proc. July 1, 1785.

A complaint having been made *ore tenus* by a solicitor, before the chancellor, in the Court of Chancery, of an arrest in returning after the hearing of a cause the indictment stating that "*at and upon the hearing of the said complaint,*" the defendant deposed, &c., it was holden a sufficient averment that the complaint was heard.

*Rex v. Aylett*, 1 Term R. 70; Dom. Proc. July 6, 1786.



## (C) How charged and assigned.

It is sufficient if the assignments of the perjury falsify the meaning attributed by the verdict to the matter sworn.

1 Term R. 70.

Where it was stated, that *at such a court J K was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the said trial it then and there became and was made a material question*—Whether, &c., it was adjudged, that these were sufficient averments, that the perjury was committed on the trial of J K for the murder, and that the question on which the perjury was assigned was material on that trial. For it is not necessary to set forth so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned; it is sufficient to allege generally, that that question became a material question.

Rex v. Dowlin, 5 Term R. 318.

In perjury in an answer in Chancery, it is not necessary to prove the identity of the person who swore the oath; it is enough if the handwriting be proved, and that the jurat was subscribed by the master as being sworn before him.

Rex v. Morris, 2 Burr. 1189.

¶ Where the perjury was assigned in an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the court, it was held no variance, the amended bill being part of the original bill.

Rex v. Waller, 3 Stark, Evid. 1138.

An indictment, stating a bill of Middlesex as issuing out of the office of the chief clerk assigned to enrol pleas in the court of our lord the king before the king himself, is bad; for it does not issue out of such office.

Rex v. Schoole, Peake's Ca. 111. It was not necessary to state out of what office the bill of Middlesex was to issue.

So where the indictment alleged that the cause came on to be tried before Lloyd Lord Kenyon, &c., William Jones being associated, &c., and from the judgment roll it appeared that R. Kenyon was associated, &c., the variance was held fatal.

Rex v. Eden, 1 Esp. Ca. 97.

If the oath is stated to have been at the assizes holden before justices assigned to take the said assize, before A B, one of the said justices, the said justice then and there having power, &c., it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and jail delivery.

Rex v. Lincoln, Russ. & Ry. Ca. 421.

If there is a clerical error, or omission in the instrument set out, the indictment must not supply it as if it were inserted. Thus, where the indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, &c., and part of the deposition so set forth was that a person therein named assaulted the deponent with an umbrella, and *at the same time* threatened to shoot, &c., but the deposition when produced ran "*and at the same threatened to shoot, &c.*," the variance was held fatal. The deposition should have been set out *verbatim*, and the meaning explained by an *innuendo*.

Rex v. Taylor, 1 Camp. 104.

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If it is alleged that the defendant swore in substance and effect as follows, &c., it must be shown that the defendant swore, in substance and effect, the whole of what is set out.

*Rex v. Leefe*, 2 Camp. 134; and see *Russ. on Cri. vol. ii. p. 538.*

An indictment may be supported on an answer in a court of equity, though the answer is not correctly entitled, and the name of one of the parties be mistaken. Thus, where an indictment alleged that Francis Cavendish Aberdeen and others exhibited their bill in the exchequer, and on the production of the bill the complainants purported to be J. C. Aberdeen and others, it was holden not a variance, and that it was competent for the prosecutor to prove by other means than the bill itself, the allegation that Frances Cavendish Aberdeen did in fact exhibit the bill.

*Rex v. Roper*, 1 Stark. Ca. 518; and see further *Russell on Cri. vol. 2, p. 539*, (2d ed.)

The indictment must contain an allegation of time, which is sometimes material and requires to be laid with precision, and sometimes not. Where it is not material it need not be positively averred, and if under a *videlicet* it may be rejected.

*Rex v. Aylett*, 1 Term R. 69, 70, 71.

In a case where an indictment for perjury charged to have been committed in the defendant's answer to a bill of discovery in the exchequer, alleged that it was filed on a day specified, it was holden that the day was not material, as it was not alleged as *part of the record*; and therefore it was held no variance, though the bill when produced appeared to be entitled generally of a preceding term.

*Rex v. Hucks*, 1 Stark. Ca. 521; and see *Rastall v. Stratton*, 1 H. Black. 49; *Woodford v. Ashley*, 2 Camp. 193; 1 Stark. Crim. Plead. 243.

But in the same case, where an indictment of perjury alleged that the defendant, at the time of effecting a policy of assurance *purporting to have been underwritten by A, B, & C, and others, on a day specified*, well knew, &c., and it appeared on producing the policy that A underwrote it on a different day, the defect was holden fatal, though it appeared that B, C, &c., did underwrite it on that day.

*Rex v. Hucks*, 1 Stark. Ca. 521.¶

In general the court will oblige the defendant to plead or demur to even a defective indictment; and they are very cautious in granting a *certiorari* to remove it. (a) And Lord Thurlow refused permission to amend the answer in chancery, where an indictment for perjury had only been threatened, though the party, having no interest, could not be supposed to make the false oath intentionally. For it is the province of the grand jury to judge of the intention. (b)

2 Hawk. P. C. c. 25, § 146. (a) *Ibid* c. 27, § 28. ¶ In a late case *Abbott*, Lord C. J., said that inasmuch as an objection taken to an indictment for perjury appeared on the record, he did not feel warranted in taking notice of it at *N. P. Rex v. Souter*, 2 Stark. R. 423. ¶ (b) *Earl Verney v. Macnamara*, 1 Bro. Ch. Rep. 419.]

¶ A party was indicted for perjury in an affidavit of debt, and the indictment, after setting out the substance of the affidavit, concluded with a *prouit patet* by the affidavit filed in the Court of B. R. at Westminster; on this indictment he was acquitted; after which he was indicted again for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, stating it to have been sworn at *No. 15, Furnival's*

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*Im, London, &c.*, and the indictment then averred, that in fact the defendant made the said affidavit in *Middlesex*, and not in *London*. Held, that the defendant was entitled to plead *auterfois acquit*; for the jurat was not a necessary part of the affidavit to be stated in the indictment, and therefore the difference between the two indictments was not material, and the same evidence as to the *real* place of swearing might have been given under the last indictment as under the first; and therefore the defendant had once before been put in jeopardy for the same offence.

*Rex v. Emden*, 9 East, 437.

On an indictment for perjury on the stat. 18 Geo. 2, c. 18, in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of John Wright, it appeared by competent evidence that the oath was administered to a person who polled on the second day by the name of John Wright, and swore to his freehold and place of abode, and that there was no such person, and that the defendant voted on the second day and was no freeholder, and sometime afterwards boasted that he had *done the trick, &c.*, and was afraid he should be pulled for his *bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other name than that of J. W.: held, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment.

*Rex v. Price*, 6 East, 323.¶

¶ In an indictment for perjury, an omission to charge in the bill of indictment, that the matter of traverse tried between the state of Tennessee and D, touching which the defendant gave his evidence, was by indictment or presentment is fatal.

*Steinston v. The State*, 6 Yerg. 531.

In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed, must be legally set forth.

*State v. Street*, 1 Murph. 156.

In an indictment for perjury when the tenor of an affidavit is undertaken to be recited, and the recital is variant in word or letter, so as to form a different word, it is fatal.

*State v. Coffey*, N. C. Term R. 272; S. C. 2 Mur. 320.

An indictment charged that at a certain court, &c., a certain issue duly joined in the said court between A & B came to be tried, and that the alleged perjury was committed *on the trial of the said issue*. The transcript of the record of the suit, offered in evidence on the trial of the indictment, did not show that *any issue had been joined*. The defendant being convicted, a new trial was granted, upon the ground that the transcript of the record did not support the charge in the indictment.

*State v. Ammonds*, 3 Mun. 123.

In an indictment for perjury committed in the taking of an oath by an insolvent on the petition for his discharge, it is not requisite to set forth more than the substance of the oath.

*The People v. Warner*, 5 Wend. 271.

Perjury may be assigned on an oath erroneously taken, especially while the proceedings in which it was taken remain unreversed.

*Van Steenburg v. Kortz*, 10 John. 167.

## (C) How charged and assigned.

On an indictment for perjury, the day on which the offence was committed must be precisely stated.

*United States v. Bowman*, 2 Wash. C. C. R. 382.

In an indictment for perjury against a person for swearing falsely at an election, an averment that he was sworn by and before the board of inspectors, is a sufficient averment that the oath was administered by the board.

*Campbell v. The People*, 8 Wend. 636.

Two defendants cannot be joined in an indictment for perjury.

*Resp. v. Goss*, 2 Yeates, 479.

An indictment for perjury at common law, which charges that the defendant "did voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," and which negatives by express averments the truth of the oath, and concludes that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit wilful and corrupt perjury," &c., is good.

*Resp. v. Newell*, 3 Yeates, 407.

An indictment which avers that the defendant did "then and there, in due form of law, take his corporal oath," without stating that he was sworn on the gospels, or by uplifted hand, is sufficiently certain.

*Resp. v. Newell*, 3 Yeates, 407.

An indictment for perjury committed on a trial for murder need not, in the statement of the indictment for murder, set out the means by which the murder was committed.

*Rex v. Lincoln*, R. & R. C. C. 421; *S. C. 2 Russ. C. & M.* 538.

At common law the word "wilful," is not requisite in an indictment for perjury; but it is necessary on statute 5 Eliz. c. 9.

*Rex v. Cox*, 1 Leach, C. C. 71.

It must appear on the face of the indictment, or it must be expressly alleged, that the oath was material.

*Rex v. M'Keron*, 2 Russ. C. & M. 541; *Rex v. Bignold*, 2 Russ. C. & M. 541.

When perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment, as if continuous, although they are in fact separated by the introduction of other matter.

*Rex v. Callanan*, 6 B. & Cr. 102.

If an indictment for perjury, in a cause at *nisi prius*, in setting out the substance of the oral testimony charged to be false, put "Mr." for "Mister," and "Mrs." for "Mistress," this is no variance, though it should appear that the witness said "Mister" and "Mistress," and not "Mr." and "Mrs."

*Rex v. Coppard*, 3 Car. & P. 59.

In an indictment for perjury, an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said A B upon his oath," is not a good averment of materiality.

*Reg. v. Goodfellow*, 1 Carr. & M. 569.g

## PIRACY.

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THE Constitution of the United States, art. 1, s. 7, n. 10, authorizes Congress "to define and punish piracies and felonies on the high seas and offences against the laws of nations."

In pursuance of the authority thus given by the Constitution, the following provisions have been made by Congress:

By the act of April 30, 1790, it is enacted, § 8, "That if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner, of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods, or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

§ 9, "That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be, a pirate, felon, and robber, and on being thereof convicted, shall suffer death."

The act of March 3, 1819, enacts, § 5, "That if any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.

§ 6, "That this act shall be in force until the end of the next session of Congress."

The Supreme Court of the United States have decided the following points which arose in a case under this act.

1. "Any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors, at the discretion of the court.

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2. "It is no matter whether the vessel be armed for offence or defence, provided she commits the unlawful acts specified.

3. "To bring a vessel within the act it is not necessary that there should be actual plunder or an intent to plunder: if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.

4. "The word 'piratical' in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing.

5. "A piratical aggression, search, restraints, or seizure is as much within the act as a piratical depredation.

6. "The innocence or ignorance on the part of the owner of these prohibited acts, will not exempt the vessel from condemnation.

7. "The condemnation of the cargo is not authorized by the act.

8. "The law of nations does not require the condemnation of the cargo for petty offences, unless the owner thereof co-operates in, and authorizes the unlawful acts. An exception exists in the enforcement of belligerent rights.

9. "Costs in the admiralty are in the sound discretion of the court; and no appellate court should interfere with that discretion, unless under peculiar circumstances.

10. "Although not *per se* the proper subject of an appeal, yet they can be taken notice of incidentally, as connected with the principal decree.

11. "When the innocence of the owners is established, it is proper to throw the costs on the vessel, which was condemned, to the exclusion of the cargo, which was liberated."

Harmony v. The United States, 2 How. (S. C.) Rep. 210.

The act of May 15, 1820, enacts, § 2, "That the fifth section of the last mentioned act be, and the same is hereby, continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects, as fully as if the duration of the said section had been without limitation.

§ 3. "That if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and, being thereof convicted, before the Circuit Court of the United States for the district into which he shall be brought or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate; and on conviction thereof, before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: Provided, that nothing in this section contained shall be construed to deprive any particular State of its jurisdiction over such offences when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court.

§ 4. "That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and,

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on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate; and, on conviction thereof, before the Circuit Court of the United States for the district wherein he may be brought or found, shall suffer death.

§ 5, "That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel, any negro or mulatto not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall, on the high seas, or anywhere on tide water, transfer or deliver over, to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto, as a slave, such citizen or person shall be adjudged a pirate; and, on conviction thereof, before the Circuit Court of the United States for the district wherein he shall be brought or found, shall suffer death."<sup>g</sup>

Piracy is incurred by depredations on or near the sea, without authority from any prince or state. For if these violations of property be perpetrated by any national authority, they are not acts of piracy. Thus, when a Bristol merchant ship, in the reign of Charles the Second, was taken by the Algerines, and afterwards driven on the coast of Ireland with some Turks and renegadoes on board, Sir Leoline Jenkins, then Judge of the Admiralty, certified to the king in the following words: (a) "As for the Moors and Turks, that are so by birth, and were found on board this ship, it is my humble opinion, that since the government of Algiers is owned as well by several treaties of peace and declarations of war, as by the establishment of trade, and even of consuls and residents amongst them, by so many princes and states, and particularly by your majesty, they cannot, as I humbly conceive, be proceeded against as pirates or sea-rovers, acting without a commission, but are to have the privileges of enemies in an open war, and must be received to their ransom by exchange or otherwise, the ordering of which doth in this case belong to the Lord High Admiral."

2 Wooddes, 422. The word "pirate" was formerly used in a better sense than that in which it is now received. It signified the person to whose care the mole, or pier of a haven, which in Latin was called *pera*, was intrusted. It was used too sometimes, according to Spelman, for a sea-captain, or soldier. Asser, in the life of King Alfred, tells us, *Rex Ælfredus jussit cymbas et galeas i. e. longas naves fabricari per regnum, impositisque piratis in illis vias maris custodiendas commisit.* (a) 2 Sir L. Jenk. 791. <sup>β</sup> Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. 5 Wheat. 153; this is the definition of the offence by the laws of nations. 1 Kent. Com. 183.<sup>g</sup>

So when one Chelina attacked a Dutch ship near the port of Dublin, and carried her away, having two British subjects on board, though it was a

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crime against our sovereign as a neutral power, under whose protection the ship lay, yet it was holden not to be punishable as piracy; for the captor had a commission of war in due form against the enemies of the French king.

2 Sir L. Jenk. 754.  $\beta$  A commission issued by Aury, as "Brigadier of the Mexican Republic," which republic was not acknowledged by the government of the United States, or as "generalissimo of the Floridas," then a province of Spain, does not authorize armed vessels to make captures at sea. United States v. Klintock, 5 Wheat. 144. $\text{g}$

$\beta$  Robbery on the high sea, by a commissioned privateer, is piracy under the act of 1790, and the law of nations.

United States v. Jones, 3 Wash. C. C. R. 209.

A confederacy by American citizens, on land, or on board of an American vessel, with pirates, or the yielding up a vessel to such pirates, is an offence within the 8th section of the act of 1790.

United States v. Howard, 3 Wash. C. C. R. 340. $\text{g}$

It is established by many authorities that goods taken by pirates remain the property of the original owners, although sold here, unless the sale be in market overt.

Jenk. 165; Godb. 193; 3 Bulstr. 29; Cro. Eliz. 685. Indeed the contrary is asserted (2 Burr. 694, 695); but the reason assigned, (*viz*: that there can be no condemnation to entitle the pirate,) shows he acquired no property, and therefore could transmit none. See 2 Wooddes, 431.  $\beta$  Property which has been piratically captured will not be forfeited for the misconduct of the captors in violating the municipal laws of the country where they have carried the property. The Josefa Segunda, 5 Wheat. 398. $\text{g}$

Such goods, therefore, the king cannot grant; for by an express statute,<sup>(a)</sup> the merchant robbed on the seas shall be received to prove that the goods or chattels belong to him by his chart or cocket, or by other lawful proof of merchants, &c., and then the said goods shall be delivered without any suit at the common law; which act is general, be the party robbed privy or a stranger.

(a) 27 E. 3, stat. 2, c. 13.

But it was holden <sup>(b)</sup> by all the judges in the reign of Richard the Third, that any foreigner, who sues on this statute, must prove his own sovereign and the sovereign of the captor to have been in mutual amity, and also his own sovereign to have been in amity with our king, at the time of the capture. For in our municipal law books it is generally and indiscriminately asserted, that piracy cannot be committed by the subjects of states at enmity.

(b) 4 Inst. 154; 3 Bulstr. 28.

The goods of pirates, not taken from others, belong, after attainder, to the crown or its grantee; and those of which others have been despoiled will be forfeited in the same manner, if the owners come not within a reasonable time to vindicate their property. And until they do so, the king may seize them, and if they be *bona peritura*, he may sell them, and, upon proof, restore the value. But by stat. 22 and 23 Car. 2, c. 11, § 11, if the company belonging to any English merchant ship take any ship, which first assaulted them, the officers and mariners shall receive such share of the condemned ship and goods as is usually practised in private men of war.

3 Bulstr. 148; 12 Co. 73.

About the time of the treaty of Nimeguen, the captain of a French merchant ship, having put into a port in Ireland, was accused by his crew of robberies on the seas, and fled. His ship and goods were confiscated, as



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having belonged to pirates. The French ambassador presented memorials, requiring the cause to be remanded to the natural judge, as was pretended, in France. But the king and his council finally adjudged, that he was sufficiently founded in point of jurisdiction to confiscate the ship and goods, and to try capitally the person himself, had he been in hold, the matter of *renvoy* being a thing quite disused among princes; and as every man by the usage of our European nations is *justiciable* in the place where the crime is committed, so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken.

2 Sir L. Jenk. 714.

Piracies and depredations at sea are capital offences, by the civil law. Piracy is said to have been punishable at common law, before the 25 E. 3, stat. 5, c. 2, as petit treason, if committed by a subject, and as felony, if committed by a foreigner. But, it seems agreed, that after that statute, by which all treason is confined to the particulars therein set down, it was cognizable only by the civil law.

Staunf. P. C. 10; 3 Inst. 112; 2 Hal. Hist. P. C. 369, 370; Hawk. P. C. c. 37, § 2.

But this proving very inconvenient, because by that law no offenders shall have judgment of death without his own confession, or direct proof by eye witnesses, it was enacted by (a) 28 H. 8, c. 15, "That all *treasons, felonies, and robberies, murders and confederacies* upon the sea, or in any haven, river, creek, or place where the admiral or admirals have or *pretend* (b) to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition as if any such offence or offences had been committed or done in or upon the land; and such commission shall be had under the king's great seal, directed to the admiral or admirals, or to his or their lieutenant deputy and deputies, and to three or four such other substantial persons as shall be named or appointed by the Lord Chancellor of England for the time being, from time to time and as oft as need shall require, to hear and determine such offences after the common course of the laws of this land used for felonies, and robberies, &c., done and committed upon the land within this realm."

[(a) By the 39 G. 3, c. 37, this provision is extended to all offences committed on the high seas, and by the 2d sect. persons tried for murder on the seas and found guilty of manslaughter only, are to have benefit of clergy, and be subject to the same punishment as if they were guilty of manslaughter on land. See *Rex v. Bailey*, Russ. & Ry. 1. This statute applies to felonies created by subsequent statutes, which it seems the 27 Hen. 8, c. 4, did not. East, P. C. 807. A party was held not triable under both or either of these statutes for maliciously shooting within 43 G. 3, c. 58. But this decision proceeded on the particular terms of the 43 G. 3, which confined its operation to England and Ireland, *Rex v. Amaro*, Russ. & Ry. 286; and this is now remedied by 1 G. 4, c. 90, § 2. See Russ. on Cri. vol. i, p. 109, and 596. (b) These words are not to be extended to a pretence without any shadow of right. 2 Hale, P. C. 17.]

And it is farther enacted by the said statute, "That if any person or persons happen to be indicted for any such offence done or hereafter to be done upon the seas, or in any other place above limited, that then such order, process, judgment, and execution shall be used, had, done, and made to and against every such person and persons, so being indicted, as against felons, &c., for any felony, &c., upon the land, by the laws of the land is accustomed."

And it is farther enacted by the said statute, "That such as shall be con-

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vict of any such offence, by verdict, confession, or process by authority of any such commission, shall have and suffer such pains of death, losses of lands, goods, and chattels, as if they had been attainted and convicted of such offence done upon the land, and also that they shall be excluded from the benefit of the clergy."

¶The 4th section provides that the act shall not extend to any persons (compelled by necessity) taking victuals, cables, anchors, &c., out of any ship which may conveniently spare the same, so as such persons pay out of hand for the same, or deliver a bill obligatory for payment thereof, to be paid in four months; if the taking be on this side the Straits of Morocco, or within twelve months, if beyond the Straits.

And when any commission under the act is directed to any place within the jurisdiction of the cinque ports, it is to be directed to the Lord Warden, and three or four other persons whom the Lord Chancellor shall appoint. ¶

In the construction of this act the following opinions have been holden:—

That it does not alter the nature of the offence, so as to make that which was before a felony only by the civil law, now become felony by the common law; for the offence must still be alleged as done upon the sea, and is no way cognizable by the common law, but only by virtue of this statute; which, by ordaining that in some respects it shall have the like trial and punishment as are used for felony at common law, shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; and from hence (a) it follows that this offence remains as before, of a special nature, and that it shall not be included in a general pardon of all felonies.

3 Inst. 112; 2 Hal. Hist. P. C. 370; (a) Moor. 756; 3 Inst. 112, Co. Lit. 391; 2 Hal. Hist. P. C. 370.

From the same ground also it follows, that no persons shall in respect of this statute be construed to be or punished as accessories to piracy before or after, as they might have been if it had been made a felony by the statute, whereby all those would incidentally have been made accessories in the like cases in which they would have been accessories to a felony at common law; and from hence it follows that accessories to piracy, being neither expressly named in the statute, nor by construction included in it, remain as they were before, and were triable by the civil law, if their offence were committed on the sea; but if on the land, by no law, until 11 & 12 W. 3, c. 7, for 2 & 3 Ed. 6, c. 24; which provides against accessories in one county to a felony in another, extends not to accessories to an offence committed in no county, but on the sea; but, by the said statute of 11 & 12 W. 3, c. 7, they are triable in like manner as the principals are by the statute of 28 H. 8, c. 15.

3 Inst. 112, Hawk. P. C. c. 27, § 7.

From the same ground also it follows, that an attainder for this offence corrupts not the blood, (b) inasmuch as the statute only says that the offender shall suffer such pains of death, &c., as if he were attainted of a felony at common law, but says not that the blood shall be corrupted.

3 Inst. 112, Hawk. P. C. c. 37, § 8. ¶(b) *Vide tamen contra*: Co. Lit. 391 a; and Lord Hale says that if there be an attainder of treason or felony done upon the sea, upon this statute by jury, according to the *course of the common law*, it seems that the judgment works a corruption of blood: and further, that if an indictment of piracy, before commissioners under the statute, be formed as an indictment of robbery at common law, viz. *vi et armis et felonice*, the blood may be corrupted; but if the indictment be in the style of the civil law, viz. *piratice deprædavit*, then that the attainder corrupts not the blood. And this distinction reconciles the passages on the subject, which are

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otherwise contradictory, in 3 Inst. p. 112, and Co. Litt. 391 a. Vide 1 Hale, P. C. 355.¶

Yet it has been resolved that an offender standing mute on an arraignment by force of this statute, shall have judgment of *paine fort et dure*: for the words of the statute are, *That a commission shall be directed, &c., to hear and determine such offences after the common course of the laws of the land.*

3 Inst. 114; Dyer, 241, pl. 49, 306, pl. 73.

It has been holden, that the indictment for this offence must allege the fact to be done on the sea, and must have both the words *felonice* and *piratice*; and that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land, and, consequently, that the taking of an enemy's ship by an enemy is not within the statute.

3 Inst. 112; Roll. Rep. 175; Hawk. P. C. c. 37, § 10.

It is agreed that this statute extends not to offences done in creeks or ports within the body of a county, because they are and always were cognisable by the common law.

Moor, 756; Roll. Rep. 175; Hawk. P. C. c. 37, § 11.

¶ This doctrine, which is also found in the 3 Inst. 113, and 4 Inst. 134, 135, and which is opposed to Lord Hale's opinion, has been lately held by the judges to be erroneous, and a place within the body of a county, and therefore subject to the common law jurisdiction, was held to be also within the concurrent jurisdiction of the admiral. John Bruce was found guilty at the Admiralty Sessions, before Lord Ellenborough and Thomson, B., commissioners under the 28 Hen. 8, c. 15, of the wilful murder of James Dean, committed in a part of Milford Haven, where it was about three miles across, about seven or eight miles from the mouth, and about sixteen miles below any bridge. The place was about twenty-three feet deep, and never known to be dry but at very low tides. Sloops and cutters of 100 tons were able to navigate where the body was found, and nearly opposite to that place men of war were able to ride at anchor. All the judges, except Grose, J., met to consider whether the place where the offence was committed was to be deemed within the jurisdiction of the commissioners, and they were unanimously of opinion that it was; although it was within the body of the county of Pembroke, and although the common law tribunals had a concurrent jurisdiction.

2 Hale, P. C. 16; Rex v. Bruce, Leach, C. C. 1093; Russ. & Ry. C. C. 243, S. C.

It is not distinctly settled what are the precise limits bounding the *concurrent* jurisdiction of the Admiral, on the one hand, in places *infra corpus comitatus*; nor, on the other hand, what is the exact boundary between the *corpus comitatus* and the *exclusive* jurisdiction of the Admiralty in respect of the matter arising on the high sea. With respect to the first point, viz.: the extent of the concurrent jurisdiction of the Admiral when exercised on spots undoubtedly *infra corpus comitatus*; Lord Hale commenting on the words of the 28 Hen. 8, c. 15, says, "This seems to me to extend to great rivers where the sea flows and reflows, *below the first bridges*, and also in creeks of the sea at full water, where the sea flows and reflows; and upon high water, upon the shore, though *these possibly be within the body of the county*," &c. And it seems that in Bruce's case (*suprà*) the judges thought that the 28 Hen. 8, applied to all great waters *frequented by ships*; that in such waters the Admiral, in the time of Henry the Eighth, pretended juris-

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diction; that by *havens*, &c., havens in England were meant, though they were all in the body of some county; and that the mischief in the first section, of the witnesses being seafaring men, was likely to apply to all places frequented by ships.

See MS. Bayley, J., Russ. on Cri. vol. i. p. 107, (2d ed.)

With regard to the second point, viz.: the boundary between the *corpus comitatus* and the high seas, where the *exclusive* jurisdiction of the Admiral commences: it is clear, that upon the open sea-shore the common law and the Admiral have alternate jurisdiction between high and low water mark. But it is sometimes matter of difficulty to fix the line of demarcation between the county and the high sea, in harbours, or below the bridges in great rivers. The question is often rather one of fact than of law; but the legal principle on which the boundary is to be drawn does not appear to be settled. Mr. East says, "In general it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, where persons *can see from one side to the other*." Lord Hale, in his *Treatise De Jure Maris*, p. 1, ch. 4, says, that the arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably* discern between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea where a man standing on the one side may *see what is done on the other*: and the reason assigned by Lord Coke, in the Admiralty case, in support of the county coroner's jurisdiction, where a man is killed in such places, because *that the county may know it*, seems rather in support of the more limited construction. The distance, however, from shore to shore, in Bruce's case, seems so considerable, that it may be doubted whether the judges, in considering the place within the body of the county, must not have recognised the criterion of Lord Hale, rather than that of Hawkins.

3 Inst. 113; 2 Hale, 17; and see 2 Hawk. c. 9, § 14. As to what is considered the *high seas*, see 1 Gall. 694; 5 Mason, 290; 2 Hagg. Adm. R. 398; Dunl. Adm. Pr. 32; Bouv. L. D. h. v.; United States v. Gibert, 2 Sumn. 19; United States v. Furlong, 5 Wheat. 184; 2 East, P. C. c. 17, § 10, p. 803, 804; 13 Co. 52.

The statute 28 Hen. 8, merely altered the mode of trial in the Admiralty Court, and its jurisdiction still continues to rest on the same foundation as before that act. It is regulated by the civil law, *et per, consuetudines marinas*, grounded on the law of nations, which may possibly give to that court a jurisdiction that our common law has not.

*Per* Mansfield, C. J., Rex v. Depardo, 1 Taunt. 29.

The Admiralty hath also a *concurrent* jurisdiction with the common law, within the body of the county, in certain particular cases of mayhem and homicide, by virtue of the stat. 15 Ric. 2, c. 3, which enacts, "Nevertheless of the death of a man, and of a mayhem done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognisance."

Vide 2 Hale, P. C. 16.]

By the 11 & 12 W. 3, c. 7, it is enacted, "That all *piracies, felonies, and robberies* committed in or upon the sea, or in any place where the Admiral has jurisdiction, may be tried and determined at sea, or upon the land in any of his majesty's islands or plantations, &c., to be appointed by the king's commission under the great seal, or the seal of the Admiralty, directed to

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any of the admirals, &c., and such persons and officers by name or for the time being, as his majesty shall think fit, who shall have power jointly or severally, by warrant under hand and seal of any of them, to commit any person against whom information of any such offences shall be given upon oath, and to call a court of admiralty, which shall consist of seven persons at the least, and shall proceed in the trial of the said offenders according to such directions as are set forth at large in the said statute."

11 & 12 W. 3, c. 7, made perpetual by 6 G. c. 19, § 3. ¶ And by the 46 G. 3, c. 54, not only the offences mentioned in the text, but *all* offences whatsoever committed on the high seas, or in the jurisdiction of the admiral, may be tried in any of the islands or colonies, by virtue of a commission under the great seal, and the commissioners to have the like power as commissioners appointed under the 28 Hen. 8, c. 15, and the offenders to incur the same punishment as if tried within the realm by virtue of a commission under that statute.¶

And it is further enacted by the said statute, § 8,(a) "That if any of his majesty's natural-born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility, against other his majesty's subjects upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders, and every of them, shall be deemed, adjudged, and taken to be pirates, felons, and robbers, and they and every of them, being duly convicted thereof according to this act, or the aforesaid act of 28 Hen. 8, c. 15, shall have and suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer."

¶(a) This clause was inserted to remove doubts whether persons capturing English vessels under commissions granted by James II. at St. Germain's after his abdication could be treated as pirates. 1 Hawk. P. C. p. 268.¶

And it is further enacted by the said statute, "That if any commander or master of any ship, or any seaman or mariner, shall in any place, where the Admiral hath jurisdiction, betray his trust and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandise, or yield them up voluntarily to any pirate; or bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt or endeavour to corrupt, any commander, master, officer, or mariner, to yield up or run away with any ship, goods, or merchandise, or turn pirate, or go over with pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or that shall confine his master, or make, or endeavour to make, a revolt in his ship, shall be adjudged to be a pirate, felon, and robber; and being convicted thereof, according to the directions of this act, shall have and suffer pains of death, loss of lands, goods and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer."

And it is further enacted by the said statute, "That all and every person and persons whatsoever, who shall either on the land or upon the seas wittingly and knowingly set forth any pirate, or aid and assist, or maintain, procure, command, counsel, or advise any person or persons whatsoever to do or commit any piracies or robberies upon the seas, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever so as aforesaid setting forth any pirate, or aiding or assisting, maintaining, procuring, commanding, counselling, or advising the same, either on the land or upon the sea, shall be adjudged to be accessory to such piracy and robbery done and committed. *And farther,*

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that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person or persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall, upon the land or upon the sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels which have been by any such pirate or robber, piratically and feloniously taken, shall be by this statute likewise adjudged to be accessory to such piracy and robbery, and that all such accessories to such piracies and robberies shall be inquired of, heard, and determined, and adjudged according to the common course of the law, according to the said statute of 28 H. 8, c. 15, as the principals of such piracies and robberies may be, and no otherwise; and being thereupon attainted, shall suffer pains of death, loss of lands, goods and chattels, and in like manner as the principals of such piracies, robberies, and felonies ought to suffer according to the said statute of 28 H. 8, c. 15, which is declared to be in full force; any thing in this act to the contrary notwithstanding."

And by 4 G. 1, c. 11, "All persons who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 W. 3, c. 7, may be tried and judged for every such offence, according to the form of 28 H. 8, c. 15, and shall be excluded from their clergy."

By the 8 G. 1, c. 24, for the more effectual suppressing of piracy, it is declared and enacted, "That if any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall anywise consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing them to be guilty of any such piracy, felony, or robbery; such offender and offenders, and every of them, shall in each and every of the said cases be deemed, adjudged, and taken to be guilty of piracy, felony, and robbery, and he and they shall and may be inquired of, tried, heard, and adjudged of and for all or any of the matters aforesaid, according to the statute made 28 H. 8, c. 15, for pirates, and the statute made 11 & 12 W. 3, c. 7, and he and they, being convicted of all or any of the matters aforesaid, shall suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to suffer; and in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board, or enter into such ship, or vessel, and though they do not seize and carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandises belonging to such ship or vessel, the person and persons, who shall be guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid."

Made perpetual by 2 G. 2, c. 28, § 7.

And § 2, it is farther enacted, "That every ship or vessel, which shall be fitted out with a design to trade with, or supply or correspond with any pirate, and all and every goods and merchandises put on board the same for any intent or purpose to trade with any pirate, felon, or robber on the seas, shall be *ipso facto* forfeited; one moiety thereof to the use of the king's majesty, his heirs and successors, the other moiety to the person or persons

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who shall first make discovery, and give information of such intent or design; and such person or persons, who shall first make such discovery, shall and may sue for and recover the said ship or vessel, and all and every the goods and merchandises on board the same, in the High Court of Admiralty."

And § 3, "Whereas there are some defects in laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy and robbery is not or cannot be apprehended and brought to justice; be it therefore enacted, That all and every person and persons whatsoever, who by the said statute made 11 & 12 W. 3, c. 7, are declared to be accessory or accessories to any piracy or robbery therein mentioned, are hereby declared and shall be deemed and taken to be principal pirates, felons, and robbers, and shall and may be inquired of, heard, determined, and adjudged in the same manner as persons guilty of piracy and robbery may and ought to be inquired of, tried, heard, determined, and adjudged by the said statute 11 & 12 W. 3, c. 7, and being thereupon attainted and convicted, shall suffer such pains of death, loss of lands, goods and chattels, and in like manner, as pirates and robbers ought by the said act to suffer."

And § 4, it is farther enacted, "That all and every offender or offenders convicted of piracy, felony, or robbery, by virtue of this act, shall not be admitted to have the benefit of clergy, but be utterly excluded of and from the same."

And § 5, "To the end that a farther encouragement may be given to all seaman and mariners to fight and defend their ships from pirates, it is farther enacted, That in case any seaman or mariner on board any merchant ship or vessel, or any other ship or vessel, shall be maimed in fight against any pirate, every such seaman and mariner, upon due proof of his being maimed in such fight, shall not only have and receive the rewards appointed by 23 Car. 2, c. 11, but shall also be admitted into and provided for in Greenwich Hospital, preferably to any other seaman who is disabled from service or getting a livelihood merely by his age."

And by § 6, "If any commander, master, or other officers, or any seaman or mariner of any merchant ship or vessel, which carries guns and arms, shall not, when they are attacked by any pirate, or by any ship or vessel on which such pirate is on board, fight and endeavour to defend themselves and their said ship and vessel from being taken by the said pirate, or shall utter any words to discourage the other mariners from defending the said ship, and by reason thereof the said ship or vessel shall fall into the hands of such pirate, then, and in every such case, every such commander or other officer, and every seaman and mariner, who shall not fight and endeavour to defend and save the said ship or vessel, or who shall utter any such words as aforesaid, shall lose and forfeit all and every part of the wages due to him and them respectively by the owner and owners of the said ship or vessel, and shall not be permitted to sue for or recover the same, or any part thereof, in any court either of law or equity, and as a farther punishment shall suffer six months' imprisonment."

And § 7, "For prevention of seamen or mariners from deserting merchant ships or vessels abroad in the plantations, or in any other parts beyond the seas, which is the chief occasion of their turning pirates, and of great detriment to trade and navigation, and is chiefly occasioned by the owner or owners of ships or vessels paying wages to the seamen or mariners when abroad, it is enacted, That no master or owner of any merchant ship or ves-

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sel shall pay or advance, or cause to be paid or advanced, to any seaman or mariner, during the time he shall be in parts beyond the seas, any money or effects on account of wages, exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to Great Britain or Ireland, or to the plantations, or to some other of his majesty's dominions whereto they belong, and from whence they were first fitted out; and if any such master or owner of such merchant ship or vessel shall pay or advance, or cause to be paid or advanced, any wages to any seaman or mariner above the said moiety, such master or owner shall forfeit and pay double the money he shall so pay and advance, to be recovered in the High Court of Admiralty by any person who shall first discover and inform of the same."

[By 18 Geo. 2, c. 30, "All persons, being natural-born subjects or denizens of his majesty, who during any wars have committed any hostilities upon the sea, or in any haven, river, creek or place where the admiral or admirals have power, authority, or jurisdiction against his majesty's subjects, by virtue or under any colour of any commission from any his majesty's enemies upon the sea, or any the places where the Admiral hath jurisdiction as aforesaid, may be tried as pirates, felons, and robbers in the said Court of Admiralty, on ship-board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery are directed to be tried; and on conviction shall suffer as any other pirates, &c., ought by virtue of 11 & 12 W. 3, c. 7, or any other act: Provided that any person who shall be tried and acquitted, or convicted, according to this act, for any of the said crimes, shall not be liable to be prosecuted for the same crime or fact as high treason. But this act shall not prevent any persons who shall not be tried according to it, from being tried for high treason by 28 H. 8, c. 5."]

[Adhering to the king's enemies, by cruising hostilely in their ships, with intent to seize the ships and goods of the king and his subjects, is triable as piracy under this statute.

Evans's case, East's P. C. p. 798.]

[And by 32 Geo. 2, c. 25, § 12, "In case any commander of any private ship of war duly commissioned according to the directions of this act, or the 29 Geo. 2, c. 34, shall agree with the commander or other person of or belonging to any neutral or other ship or ships, vessel or vessels, except those of his majesty's declared enemies, for the ransom of any such neutral or other ship, &c., or the respective cargo or cargoes thereof, or any part thereof, after the same shall have been taken as prize, and shall, in pursuance of any such agreement or agreements, actually quit, set at liberty, or discharge any such prize or prizes, instead of bringing the same into some port or ports belonging to his majesty's dominions, every such offender shall be deemed guilty of piracy, felony, and robbery, and on conviction (in the manner the act describes) shall suffer such pains of death, &c., as pirates, felons, and robbers upon the seas ought to suffer according to the laws now in being. But the commander of any private ship of war, upon the capture of any neutral vessel, which by any law or treaty shall be liable only to the forfeiture of such contraband goods as shall be on board thereof, may receive such goods in case the commander is willing to deliver them, and thereupon quit, set at liberty, or discharge such neutral ship or vessel."

By 23 G. 3, c. 25, all contracts for ransoming any private vessel, &c., captured by the king's enemies, are void, and the offender liable to a penalty of 500*l*.

By 30 Geo. 2, c. 25, § 20, and 33 G. 3, c. 66, § 70, a session of oyer



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and terminer, and jail-delivery, for the trial of offences committed on the high seas, shall be holden twice at the least in every year at the Sessions House in the Old Bailey, or at such other place as the Lords of the Admiralty shall appoint. And the commissioners named in the commissions of oyer and terminer for the trial of such offences, as also any justices of the peace, may take informations touching offences committed upon the seas, and cause the parties to be apprehended and committed; they may also oblige any persons they think necessary to enter into recognisances to appear, prosecute, and give evidence at the sessions, and upon their refusal to do so, may commit them; which recognisances and informations are to be transmitted to the registrar of the Court of Admiralty.]

|| By the stat. 7 Geo. 4, c. 38, it is enacted, "That it shall and may be lawful to or for any one or more of the commissioners for the time being, named or to be named, in the commission of oyer and terminer, for trying of offences committed within the jurisdiction of the Admiralty of England, and also to and for any one or more of the commissioners for the time being, named or to be named, in any commission made or granted under or by virtue of the act of the 46 Geo. 3, c. 54, and also to or for any one or more of his majesty's justices of the peace for the time being for any county, riding, division, or place in the United Kingdom; and they are hereby respectively authorized, empowered and required, from time to time, to take any information or informations of any witness or witnesses upon oath, which oath they and each of them are hereby respectively authorized to administer, touching any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any river, haven, creek, or place where the admiral or admirals hath or have power, authority, or jurisdiction; and thereupon, (if such commissioner or commissioners, justice or justices of the peace, shall see cause,) by any warrant or warrants under his or their hand or seal, or hands and seals, to cause the person or persons charged in such information or informations, to be apprehended and committed to safe custody, to remain in such custody until discharged in due course of law, or until bailed, in cases in which bail may by law be taken."

By 7 & 8 Geo. 4, c. 28, § 12, it is enacted, that all offences committed within the jurisdiction of the Admiralty shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon land.

By 7 Geo. 4, c. 64, § 27, it is enacted, That it shall be lawful for the judge of the Court of Admiralty, in every case of felony, and in every case of misdemeanor therein before enumerated, (in § 23,) committed on the high seas, to order the assistant to the counsel for the affairs of the Admiralty and navy to pay such costs and expenses, and compensation to prosecutors and witnesses, in like manner as other courts may order the treasurer of the county to pay them; and such assistant is required on sight of every such order to pay the money mentioned, and shall be allowed the same in his accounts.

This enactment puts prosecutors in the Court of Admiralty on the same footing as those in other criminal courts, in regard to the allowance of expenses. ||

## [PISCHARY.]

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A **PISCHARY** is said to be a right or liberty of fishing in the soil of another. Blount's Law Dict. verb. *Pischary*. But a man may have *liberam piscariam* in his own soil. Skin. 678.

Our law books make mention of three sorts of fishery, *libera*, *separatis*, *communis*.

2 Salk. 637.

In order to constitute a *several* fishery, it is necessary that the party claiming it should so far have the right of fishing independently on all others, as that no person should have a *co-extensive* right with him in the subject claimed; for where any person has such co-extensive right, there it is only a *free* fishery. But a partial, independent right in another, or a limited liberty, is not inconsistent with a right to a *several* fishery.

Seymour v. Lord Courtenay, 5 Burr. 2814.

Whether ownership of the soil is essential a *several* fishery is a point upon which there hath been a great diversity of opinion, and which is not yet finally settled.

5 Burr. 2814, Dougl. 56. That it is necessarily included in a *several* fishery, see 2 Bl. Com. 39; 2 Salk. 637; Dav. 55 b; 17 Edw. 4, 6; 18 Edw. 4, 4; 10 Hen. 7, 24, 26, 28; Plo. Com. 154. That it is not, Co. Lit. 4 b, 112 a; Bract. 108 b; Bro. tit. Tenures, pl. 75; Fitzh. Sci. Fa. 100; Godb. 117; 20 Vin. Abr. 201. The latter seemeth to be the better opinion; for the utmost that can be deduced from the cases cited in support of the former is, that a *several* fishery shall be presumed to include the soil, until the contrary is proved. See Co. Lit. 112 a, note 7, last edition. ¶ See 5 Barn. & C. 885.¶

A *free* fishery is considered by Sir Wm. Blackstone as an exclusive right of fishing in a public river, and is referred by him to the head of franchises. But this doctrine is, at least, questionable, our law books(a) extending this kind of fishery to *all* streams indiscriminately, whether *private* or *public*. The same learned writer, too, saith, that a *free* fishery imports an exclusive right, and so differeth from *common of pischary*; that in a *free* fishery a man hath a property in the fish before they are caught; in a *common of pischary* not till afterwards. But this doctrine, though supported by some(b) authorities, is impugned by others. Lord Coke(c) considers *common of fishery* and *free fishery* as the same thing. For, he saith, that a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscarie*, or *liberam piscariam*, the owner of the soil shall fish there. And Eyre, J., said,(d) that the word *libera*, *ex vi termini*, implied *common*. And that a man cannot declare in trespass for taking his fish in a *free* fishery was expressly holden in two cases,(e) and the judgment for that reason reversed. The right to the property of the fish in a *free* fishery, till caught, was negatived by the court incidentally in a still earlier case.(g) Lord Mansfield, in the case of Seymour v. Lord Courtenay, saith, that where any person hath a *co-extensive* right with another, it is a *free* fishery.(h)

2 Bl. Com. 39. (a) F. N. B. 88, G.; Fitz. Abr. Ass. 422; 4 Ed. 4, 28; 17 Ed. 4, 6 b, 7 a; 7 Hen. 7, 13 b; Cro. Car. 554; 1 Ventr. 123; Skin. 677; Carth. 285. β *Quære*, Whether a *free* fishery can exist in this country. Yard v. Carman, 2 Penning, 936. A *free* fishery is not exclusive fishery. Melvin v. Whiting, 7 Pick. 79.g

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(b) Reg. 95 b; 43 Ed. 3, 24; 2 Salk. 637; Carth. 285. (c) Co. Lit. 112 a. (d) 2 Salk. 637; Carth. 285. (e) Upton v. Dawkins, 3 Mod. 97; Com. 11, S. C.; Peake v. Turner, cited in Carth. 286, in margin. (g) Child v. Greenhill, Cro. Car. 554. (h) 5 Burr. 2816.

If a man justifies for using a pischary, he ought to show whether it be common, free, or several. So whether it be appurtenant to a manor or mesuage, &c., for it is an interest, and not a mere liberty or easement.

Hardr. 407.

A fishery, without more, is a tenement within the statute 9 & 10 W. 3, c. 11, so as to entitle a person renting it to a settlement, for the court will intend that the soil passed with it. It is indeed doubtful, whether it is material for this purpose that the soil should pass.

Rex v. Old Alresford, 1 Term R. 358. In this case, one learned judge is reported to lay it down broadly, that a fishery is a *tenement*; that trespass will lie for an injury to it; and it may be recovered in ejectment.

¶ *Separalis piscaria* enjoyed by a subject in a navigable river where the tide flows, under a grant before time of memory, is an incorporeal hereditament; and consequently a term for years in it cannot be created without deed.

Duke of Somerset v. Fogwall, 5 Barn. & C. 875. ¶ The owner of land through which an unnavigable stream passes has the exclusive right of taking fish therein opposite to his land. Waters v. Lilley, 4 Pick. 145. When he owns land only on one side, he has a right to take fish to the middle of the stream. This right, in both cases, is subject to be regulated by the government. Commonwealth v. Chapin, 5 Pick. 199; Vinton v. Welsh, 9 Pick. 87; 4 Pick. 145. But such owner has no right wholly to obstruct the passage of the fish. 5 Pick. 199. See Brink v. Richtmyer, 14 Johns. 255; Hooker v. Cummings, 20 Johns. 90; Palmer v. Mulligan, 3 Caines, 318; Jacobson v. Fountain, 2 Johns. 175; The People v. Platt, 17 Johns. 195; Gould v. Jones, 6 Cowan, 369.

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aquæ*. (a) But in navigable rivers the proprietors of the land on each side have it not; the fishery is common, it is *prima facie* in the king, and is public. But the crown may grant a several fishery in a navigable river, where the sea flows and reflows, or in an arm of the sea; and on the other hand there may be a free fishery, or a co-extensive right of fishing with the owners of the soil in a river not navigable. In the one case the presumption is in favour of the appropriate right, in the other case the presumption lies the contrary way. In these, as in all other cases of presumption, the presumption will stand till the contrary is *proved*.

Carter v. Muscot, 4 Burr. 2362; Lord Fitzwalter's case, 1 Mod. 105; Dav. 55; Mayor, &c. of Oxford v. Richardson, 4 Term R. 439; {Willes, 265, Ward v. Creswell; 2 Bos. & Pul. 472, Bagot v. Orr. The common law doctrine—that fresh water rivers in which the tide does not ebb and flow belong to the owners of the banks—has never been applied to the Susquehanna, and other large rivers in Pennsylvania. Such rivers are navigable, although there is no flow and reflow of the tide, and they belong to the commonwealth. No one therefore has a right to an exclusive fishery therein, on the principles of the common law, nor has such a right been granted to any one by the proprietaries or by the commonwealth. 2 Bin. 475, Carson v. Blazer. See 3 Cain. 312, 315, 318, Palmer v. Mulligan. And *quære*, whether a custom that the owners of the banks shall have an exclusive fishery in the river opposite to their shores is good. 2 Bin. 475.} ¶ (a) Proof of the owner's right to fish opposite his own land *ad medium filum aquæ* cannot be given under a plea claiming a common of fishery. Bennett v. Costar, 8 Taunt. 183; 2 Moo. 83.

¶ It is clear that *prima facie* every subject of the realm has a right to take fish found on the sea-shore between high and low water-mark; but this

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general right may be abridged by an exclusive right in some individual. And it is doubtful whether the subject has *prima facie* a right to take *fish-shells* on the sea-shore between high and low water-mark.

Bagott v. Orr, 2 Bos. & Pul. 472.

Where the lessees of a fishery had publicly landed their nets on the shore at A for more than twenty years, and had at various times dressed and improved the landing place, (both the fishery and the landing place having originally belonged to one person, but no evidence being offered to show that he, or those who under him owned the shore at A, knew of the landing nets by the lessees of the fishery,) the court held that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at A.

Gray v. Bond, 2 Bro. & Bing. 667; 5 Moo. 527.

Where one has a right, under ancient deeds, to have a weir across a river for taking fish, and such weir has theretofore been made of brushwood, through which fish could escape, he cannot convert it into a *stone* weir, whereby the fish are prevented from escaping. And an acquiescence in such an alteration for twenty years, will not bind the party from seeking his remedy after that period, where the public are interested in the right.

Weld v. Hornby, 7 East, 195.

Where, under an act of parliament, a canal reservoir was made over lands in which A and B had separate interests, and the act provided that it should be lawful for the owner or owners of the land, on which any such reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking fish therein; it was held that A and B were not tenants in common of this fishery, but that each had a several right of fishery in the water over his own land; and that when the reservoir was exhausted, each must take his chance of the fish left aground on his own soil.

Snape v. Dobbs, 1 Bing. R. 202; 8 Moo. 23.

§ The compact between New Jersey and Pennsylvania, recognises the right of fishery in the riparian owners on the Delaware.

Bennet v. Boggs, 1 Bald. 60.

Neither the federal Constitution, nor that of the state of New Jersey, secures a common right of fishery in the state of New Jersey.

1 Bald. 60.

The right of navigation is superior to that of fishery.

Post v. Munn, 1 South. 61.

The proprietors of New Jersey, under the grant of the Duke of York, did not take such property in the soil of the navigable rivers in that state, to authorize them to grant several fisheries therein.

Arnold v. Mundy, 1 Halst. 1.

If no lawful appropriation has been made of the fish in a navigable river by the towns adjoining, or extending across such river, or by the legislature, any citizen may take them, so that he does not trespass on the lands of others.

Coolidge v. Williams, 4 Mass. 140; Freary v. Cooke, 14 Mass. 488; Commonwealth v. Chapin, 5 Pick. 199.

The right to take shell-fish on the land of an individual, between high and low water, is a common right.

Peck v. Lockwood, 5 Day, 22.

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A riparian proprietor, on a navigable river, possesses an exclusive right to take fish on his own land; but the right of fishing in such river is a common right.

*Lay v. King*, 5 Day, 72.

*Prima facie* the right of fishery in a navigable river is public; though an exclusive right may be granted to an individual by the legislature, it cannot be acquired by an uninterrupted possession and use for fifteen years.

*Chalker v. Dickinson*, 1 Conn. 382.

The riparian owners of land on Connecticut river, above the flowing and ebbing of the tide, have an exclusive right of fishery, opposite their land, to the middle of the river; and the public have an easement in the river as a highway for passing and repassing with every kind of water-craft.

*Adams v. Pease*, 2 Conn. 481.

One may prescribe for an exclusive fishery in an arm of the sea, where the tide ebbs and flows.

*Gould v. Jones*, 6 Cowen, 369.

Clearing out a fishing-place in a river does not give an exclusive right of fishery.

*Westfall v. Van Anker*, 12 Johns. 425.

Oysters planted by an individual in a bed clearly designated and marked out in a bay or arm of the sea, which is a common fishery to all the inhabitants of the town in which the bay is situated, are the property of him who planted them, and, for any direct interference with them by another, trespass lies.

*Fleet v. Hegeman*, 14 Wend. 42.

No person has a several or exclusive right of fishery in any of the navigable rivers of the state of South Carolina.

*Collins v. Benbury*, 3 Ired. 277.*g*

**WHALE-FISHERY.** It may, perhaps, be questioned, whether the decisions on the customs of the whale-fishery strictly fall under the present head; but convenience requires their insertion in this place.

In one case it was agreed, that the custom, as settled by determinations at Guildhall, was as follows:—While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time struck by a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.

*Littledale v. Scaith*, 1 Taunt. R. 243, *notd*; and see *Fenning v. Lord Grenville*, 1 Taunt. 241.

But in a subsequent case, the custom proved was, that the first striker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured him without the interference of the second striker; and Best, C. J., thought this custom more reasonable than that stated in *Littledale v. Scaith*, and the jury found accordingly.

*Hogarth and others v. Jackson and others*, Moo. & Malk. 58.

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And it was lately held by Bayley, J., that if, while the fish is fast to the harpoon of the first striker, another come up unsolicited, and so disturb the fish that she breaks from the first harpoon, and then he strikes her with a harpoon himself, and secures her, the fish continues the property of the first striker.

*Skinner v. Chapman*, Moo. & Malk. 59.]

[By the statute of Geo. 3, c. 14, persons convicted of stealing, taking, or destroying any fish, ||bred, kept, or preserved||(a) in any river or stream, pond, pool, or other water, in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling-house, or aiding or assisting therein, or receiving or buying the fish knowing them to be stolen or taken, shall be transported for seven years. The prosecution, however, must be within six months after the offence committed; and any offender convicting an accomplice is entitled to a pardon.

[(a) See *Rex v. Carradice*, Russ. & Ry. C. C. 205. This statute is repealed by 7 & 8 G. 4, c. 27; and see *infra*.]

By § 3, every person convicted of taking or destroying, or attempting to take or destroy any fish in any river or stream, &c., not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-house, but shall be in any other enclosed ground (b) which shall be private property, shall forfeit the sum of five pounds to the owner of such river or stream, &c. But this clause, it is expressly provided, § 5, shall not extend to any person who shall have a just right or claim to take, kill, or carry away any such fish.

[(b) A stream of water running by the side of a piece of ground which is enclosed on every side, except that on which it is bounded by the water, is not a stream in enclosed ground, within the meaning of this clause. *Lisle v. Brown*, 1 Marsh, 197; 5 Taunt. 440.]

. It is obvious, therefore, that a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under this act.

*Kinnersley v. Orpe*, Dougl. 517.]

[By the stat. 7 & 8 Geo. 4, c. 29, § 34, it is enacted, "That if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through, or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed, (if any) such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing hereinbefore contained shall extend to any person angling in the day-time; but if any person shall, by angling in the day-time, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any sum, not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum, not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any

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parish, township, or vill, shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was either committed in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto."

By the 35th section of the same statute, it is enacted, "That if any person shall at any time be found fishing at any time against the provisions of this act, it shall be lawful for the owner of the grounds, water, or fishery where such offender shall be so found, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for destroying or taking fish, which shall then be in his possession; and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: provided always, that any person angling in the day-time against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

By the stat. 7 & 8 Geo. 4, c. 30, § 15, it is enacted, "That if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully or maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any mill-pond, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice, publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment."||

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## PLEAS AND PLEADINGS.

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**PLEADING** in general signifies the allegations of parties to suits when they are put into a proper and legal form; which are distinguished, in respect to the parties who plead them, by the names of bars, replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters, &c. And though the matter in the declaration or count does not properly come under the name of pleading, yet, being often comprehended in the extended sense of the word, we have considered it under this head.

β Cowp. 682; Dougl. 278; 3 T. R. 159. Pleading has a more popular meaning, but it is not employed by the profession in that sense, it signifies forensic argument. Steph.

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Plead. Appx. note (1). And the word *plea* signifies, sometimes, a suit or action, as for example, A B was summoned to answer C D of a *plea* that he render, &c. Stephen, Plead. 38, 39, note (g); Warr. Law Studies, note (n); and at other times it means the defendant's answer by matter of fact to the plaintiff's declaration. Steph. Plead. 62. See Bouv. L. D. Pleas; *ibid.* Pleading.

Pleading in strictness is no more than setting forth that fact which in law shows the justness of the demand made by the plaintiff, or the discharge and defence made by the defendant. And herein, no greater certainty is required than is sufficient to bring on a trial without inveigling judge or jury. It seems that originally pleadings were so formed, and were very plain and concise; but in progress of time pleaders, yea, and judges, became too curious in them, so that the art and dexterity of pleading, which in its (a) use, nature, and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with convenient certainty, began to degenerate from its primitive simplicity and true use, and end in a piece of nicety and curiosity; which, how it hath improved therein in later times, the length of the pleadings, the many unnecessary repetitions, and the many miscarriages of causes upon small and trivial objections, do but too sufficiently testify.

(a) Recommended by Littleton as the most honourable, laudable, and profitable thing in the laws of England. Lit. § 534; and by Lord Coke, Co. Lit. 17 a, 168, 303; 2 Co. Tooker's case, and Hob. 162, 292, 295. {1 John Rep. 471.}—And it seems, that anciently fines were imposed *pro stulte loquio*, or *stulte dicto*, which were mulcts laid on pleaders by the courts for barbarous and disorderly pleading. 2 Inst. 123.

β The pleadings ought to state the legal effect of the facts, not the facts themselves.

Dyett v. Pendilton, 8 Cowen, 727.

Pleas were anciently (b) *ore tenus*, and afterwards minuted down by the prothonotaries, and entered of record in the Latin tongue, that being a dead language, and least subject to variation, to remain as muniments and precedents of the law; that the pleadings should be in Latin is expressly enacted by the 36 E. 3, c. 15, which statute was made to abolish a law introduced by William the Conqueror, which ordained that the pleadings in the courts of justice should be in French.

10 Co. 132. β According to Blackstone, the French-Norman language was the language of the records, writs, and pleadings, until the time of Edward III. Mr. Stephen thinks Blackstone has fallen into an error, and says that from the earliest period to which that document can be traced, the record was in the Latin language. Plead. Appx. note 14. (b) And being so is the reason that a plea, whilst in paper, may be amended. Vide title *Amendment*.

But now by 4 G. 2, c. 26, it is enacted, "That all writs, process, pleadings, rules, indictments, records, and all proceedings in any courts of justice within England, and in the court of Exchequer in Scotland, shall be in the English tongue, and be written in such common hand as acts of parliament are usually engrossed in, the lines and words to be written at least as close as the said acts usually are, and not abbreviated; and all persons offending against this act shall forfeit 50*l.* to any person who will sue for the same."

But by 6 G. 2, c. 14, it is provided, "That the above penalty shall not be extended to the expressing the names of writs, or technical words in the same language, as hath been used, nor to abbreviations used in the English language."

[See a similar reservation in the above act of 36 E. 3.]

In pleading, there are several general rules laid down in our books; as,



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That good matter must be pleaded in right form, apt time, and due order, but that that which is but inducement or conveyance to the substance, need not be so certainly alleged as that which is the gist of the plea.

Co. Lit. 303; Plow. 65, 81; Cro. Ja. 362. *§* Defects in matter of form are cured by verdict. *Waldin v. Payne*, 2 Wash. 1; *Payne v. Ellzey*, 2 Wash. 143; *Hunnicutt v. Caraley*, 1 Hen. & Munf. 153.*g*

That that which is apparent to the court, and appears from a necessary implication in the record, need not be averred.

Co. Lit. 303; 7 Co. 40; *Dyer*, 16.

That every man's plea shall be taken most strongly against himself, as every body is presumed to make the most of his own case.

Co. Lit. 303; *Hob.* 234; *Latch.* 186.

That what the parties have agreed in pleading shall be admitted, though the jury find otherwise.

2 Mod. 5.

That when a man will recover a thing from another, it is not enough for him to destroy such person's title, but he must prove his own a better, according to the rule, *melior est conditio possidentis*.

*Vaugh.* 58, 60, *per* *Ld. Vaughan*.

That every man shall plead such pleas as are pertinent and proper for him, according to the quality of his case, estate, or interest.

Co. Lit. 285, 303.

That the law requires in every plea two things: the one, that it be in matter sufficient; the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting it is cause of demurrer.

*Hob.* 164, *per* *Ld. Hobart*.

That every plea in bar, being a confession and avoidance of the plaintiff's action, must be substantive and certain, with an avoidance of the plaintiff's demands, which he may traverse, and thereon go to issue; because the declaration of the plaintiff stands confessed as far as it is not avoided by the defendant.

*Dyer*, 66; *Godb.* 253; *Leon.* 78.

That if a count, avowry, which is in nature of a count, replication, &c., want (a) form, or (b) omit circumstance of time, place, &c., they may be made good by the plea of the adverse party; but, if they want substance, they cannot be made good; so, in such cases, the bar may be made good by the (c) replication, and the replication by the rejoinder, &c.

7 Co. 25 a; 8 Co. 190 b; Co. Lit. 303. (a) Duplicitly in the declaration cured by pleading over. 2 Vent. 222. (b) A suit depending must show in what court, but cured by pleading over. 1 Lev. 195.—Not alleging *prout patet per recordum* cured by pleading over. 3 Lev. 11. In debt for rent, if no place be assigned where the lease was made, the defendant in his plea confessing the lease, makes the declaration good. *Hob.* 89. (c) Fault in the plea cured by the replication. *Carth.* 66.—And that if a man pleads over, he shall never take advantage of any slip committed in the pleading of the other's side, which he could not take advantage of upon a general demurrer. 2 Salk. 519, pl. 18. *Per* *Holt*, C. J.

That all pleas must be alleged directly, and not by way of rehearsal; nor is it sufficient that what ought to be expressly pleaded may be deduced by argument from what is pleaded.

Co. Lit. 303. *Vide postea*.

That in matters triable by our law, all things issuable ought to be specially alleged in order to have a convenient trial; but in matters spiritual (d) the

## Pleas and Pleadings.

law is otherwise; because there is no peril in the trial; and therefore, if certain enough to ground a certificate, it is sufficient.

3 Leon. 300. Laid down as a rule by Ld. Anderson, cited in Show. P. C. 94. (d) Sentences in the spiritual courts may be alleged summarily; as, that a divorce was betwixt such parties for such a cause, and before such a judge; but the judge must be named, that the court may write to him: that this is sufficient, it being to no purpose to allege them particularly, because the forms of these courts are different from those of the common law; and our judges presume that they are observed by the judges of those courts. Co. Lit. 303.

That surplusage does not vitiate, unless it be contrariant to the matter pleaded before.

That where one is authorized to do a thing by common law, statute, custom, grant, or commission, he ought to show that he hath pursued the substance of it accordingly.

Co. Lit. 303.

That general estates in fee-simple may be generally alleged, as that J S was seised in fee; but the commencement of particular estates must be shown, because they could not originally commence without a conveyance, which must be shown unless they be alleged by way of inducement only.

Co. Lit. 121 a, 303. But for this, and the pleading a Que Estate, vide Bro. tit. *Que Estate*; 18 Edw. 4, 10; Dyer, 238 b; Cro. Eliz. 22; Cro. Car. 190, 428; Cro. Ja. 673; Yelv. 76; Lev. 190; Sid. 297; 2 Keb. 87, 96; Skin. 303, pl. 7; 2 Mod. 55; Raym. 389; 2 Salk. 562; Carth. 9, 208, 432, 444.

That pleas ought to conclude properly: those to the writ to conclude to the writ, those in bar to the action; estoppels must rely on the estoppel.

Co. Lit. 303.  $\beta$  A replication of *nil tiel record* to a plea of former judgment, must conclude to the country. Baldwin v. Hale, 17 Johns. 272. See Comly v. Lockwood, 15 Johns. 188; Oystead v. Shed, 13 Mass. 520.*g*

$\beta$  When several facts constituting one point of claim or defence are pleaded by a party, his adversary is not at liberty to traverse each fact, but must confine himself to the denial of one of the facts alleged, if such denial, verified by proof, will bar the claim or defeat the defence.

Tuttle v. Smith, 10 Wend. 386.*g*

But for the better understanding of these matters, we must more particularly consider,

(A) The several Parts, and the Order of Pleading.

(B) The Declaration: And herein,

1. *The Nature thereof; and therein, of adding several Counts in the same Declaration.*
2. *Who may join or be joined in the same Declaration.*
3. *What Matters may be joined in the same Declaration.*
4. *Of the Declaration's agreeing with the Writ.*
5. *Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gist of the Action. And herein,*
  1. Where by the Declaration it must appear that the Plaintiff hath a Right.
  2. Where the Plaintiff must show that he hath performed what was requisite on his Part: [And herein, of Conditions precedent and subsequent, and independent Covenants.]
  3. Where general Allegations in the Declaration are sufficient; and therein, of Misrecitals, Omissions, [and Variances.]
  4. Where the Averments must be positive and express in the Declaration.

Pleas and Pleadings.

5. Of the Certainty required in the Description of the Thing declared for.
6. Of the Declaration's being good in Part, and void in Part.

(C) Of Imparance: And herein,

1. *Of the Nature thereof, and the several Kinds.*
2. *What the Defendant must do before any Imparance.*
3. *What he is to plead after a general Imparance.*
4. *What may be pleaded after a special Imparance.*
5. *In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparance.*

(D) Of making Defence: And herein, of the Difference between full and half Defence.

(E) The several Kinds of Pleas: And herein,

1. *Of Pleas to the Jurisdiction: And therein,*
  1. *To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Conusance.*
  2. *The Manner and Time of pleading to the Jurisdiction.*

(F) Of Pleas in Abatement.

(G) Of Pleas in Bar and in Chief: And herein,

1. *Of the General Issue, and how formed.*
2. *Immaterial and informal Issues, and where aided.*
3. *Of special Pleas; and therein, of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.*
4. *Of sham Pleas, and the Consequence of false Pleading.*

(H) Traverse: And herein,

1. *The Nature thereof.*
2. *In what Cases a Traverse is permitted.*
3. *In what Cases a Traverse is necessary.*
4. *Whether there may be a Traverse upon a Traverse.*
5. *To what Point the Traverse shall be taken; and therein what Matters are traversable, and of the Manner of taking thereof.*

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. *That the Plea must be proper, and adapted to the Action.*
2. *That the Plea must be good in Substance; and therein, of Matter of Inducement, and that which is the Gist of the Defence.*
3. *Of general Pleading to avoid Prolixity; and therein, of affirmative and negative Pleas.*
4. *Of Surplusage and Repugnancy in Pleading.*
5. *That the Pleading ought to be direct and not argumentative.*
6. *Negative Pregnant.*
7. *What Things must be pleaded according to their Operation in Law.*
8. *Of Colour in Pleading.*
9. *Of Pleading Non-tenure and Disclaiming.*
10. *Pleading Hors de son Fee.*
11. *Estoppels in Pleading.*
12. *Pleading with a Profert, and demanding Oyer; And herein,*
  1. *In what Cases there must be a Profert or Monstrans de Fait.*
  2. *Of demanding Oyer.*
13. *Pleading a Recovery in a former Action.*
14. *Plea of a Tender.*
15. *Plea of Justification.*
16. *Of altering Pleas and curing Defects in Pleadings.*

## (A) Of the several Parts, and the Order of Pleading.

## (K) Duplicity in Pleading: And herein,

1. *The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.*
2. *What shall be said Duplicity in Pleading.*
3. *Of pleading double by Leave of the Court.*

## (L) Departure in Pleading.

## (M) Repleader: And herein,

1. *Of the Nature of a Repleader, and Manner of awarding it.*
2. *A Repleader in what Cases to be awarded.*
3. *Repleader at what Time to be awarded.*

## (N) Demurrer: And herein,

1. *The Definition and Nature of a Demurrer.*
2. *The Manner and Form of Demurring; and therein, of joining in Demurrer, and waiving thereof.*
3. *What Facts are admitted by a Demurrer.*
4. *How far a Judgment on a Demurrer is peremptory.*
5. *Of the Difference between a general and special Demurrer.*
6. *What Things are good on a general Demurrer, that would be otherwise on a special one.*
7. *Demurrer to Evidence.*

## (O) Plea at what Time to be put in, and the Ceremony requisite therein.

## (P) Continuance and Discontinuance in Pleading.

(Q) Pleas *Puis darrein continuance*.

## (A) Of the several Parts, and the Order of Pleading.

THE first thing in pleading is the plaintiff's count or declaration, in which he sets forth the causes of his complaint particularly, and thereby explains his writ; and this he must do in such a manner as to make it appear to the court there is sufficient foundation for his bringing the action; and all essentials, or whatever is of the substance of the action, must be alleged, that the court may be enabled to give judgment for him in case a verdict should be found in his favour.

Doct. Pl. 84; Co. Lit. 17 a; Plow. 84. Vide the next title.

The next thing is the defendant's plea or bar. Pleas are variously distinguished: the more general division of them is that of being dilatory or peremptory; or they are, 1stly, Pleas in abatement; 2dly, Such as suspend the action; or, 3dly, Such as bar the plaintiff for ever. And as the plaintiff's declaration must set forth all essentials necessary to maintain it, so the defendant's bar must be substantially good and certain, with an avoidance of the plaintiff's demands, which the plaintiff may traverse, and thereon go to issue.

The replication is the plaintiff's answer to the defendant's plea, which fortifies and supports his declaration; the rejoinder is the defendant's answer thereto: so, of sur-rejoinders, rebutters, sur-rebutters, &c., in which the material thing is that they pursue what hath been at first alleged and insisted upon, otherwise it will be a departure in pleading; as if a matter be pleaded at common law, this cannot be maintained by a custom: as in covenant on an indenture of apprenticeship to serve seven years, the breach assigned was, that he did not serve, &c., the defendant pleaded infancy; the plain-

## (A) Of the several Parts, and the Order of Pleading.

tiff replied the custom of London, and adjudged a departure. So an action at common law cannot be made good in the replication by an act of parliament. But if one pleads a statute, and the other says it is repealed, he may reply, that it is revived by another, for this fortifies the first matter.

Vide, under the division, *Departure in Pleading*.

In debt upon a bond, conditioned to save a parish harmless concerning a bastard child which the obligor was forced to father, he pleads *non damnificatus*; they reply, that the child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.*: Defendant rejoins that he was ready to pay the money and save the parish harmless; upon this they demurred, and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue on the child's being ready to starve; for if the plaintiffs had once cause of expense about the child, and were thereupon actually damnified, the defendant's being ready to pay the money will not save the condition of the bond.

Pasch. 22 Car. 2, in B. R.; 2 Sand. 80; Sid. 444; Mod. 43; 2 Keb. 612, 619, S. C., Richards v. Hodges. ¶Vide Hayes v. Bryant, 1 H. Bl. 253, where the plaintiff took issue on a similar rejoinder, though it is clearly demurrable; and vide Serjeant Williams's note, 2 Saund. 84.¶

When the plaintiff replies, sur-rejoins, &c., and it thereby appears that he has no cause of action, he shall never have judgment, though the bar or rejoinder be insufficient, nor can any admittance of the adverse party make it good, for the court ought to judge on the whole record; as, in debt on a bond for performance of covenants, the defendant pleads performance generally, where some of the covenants are in the negative, whereby his plea is insufficient; if the plaintiff reply, and show a breach which of his own showing is no breach, judgment shall be given against him; for on the whole record it appears he has no cause of action.

8 Co. 133 b.

But if the bar be insufficient in substance, or amount to a concession of the point of the action, and the plaintiff in his replication show no matter against himself but matter explanatory, or perhaps not material, the declaration being good, the plaintiff shall have judgment for the insufficiency of the bar, without any regard to the replication; as if the defendant plead a grant by letters patent in bar which are not sufficient, and the plaintiff in his replication show another clause in the said letters patent which is not material, the defendant demur, the plaintiff shall have judgment.

8 Co. 133 b; 9 Co. 110; Hob. 14, 199; Lev. 31; 3 Lev. 244.

If the plaintiff make a title in his replication, but do not plead as he ought, especially in point of trial, the rejoinder admitting this, and tendering issue upon another matter, makes it good.

Lev. 195.

The order of pleading is, 1. To the jurisdiction of the court. 2. To the person of the plaintiff, and next of the defendant. 3. To the count or declaration. 4. To the writ. 5. To the action of the writ. 6. To the action itself in bar thereof.

Co. Lit. 303.

This has been settled as the most natural order of pleading, because by this order each subsequent plea admits the former; as where the defendant pleads to the person of the plaintiff, he admits the jurisdiction of the court; for it would be nugatory to plead any thing in that court that has no juris-

## (B) The Declaration.

diction in the case; when he pleads to the count, he allows that the plaintiff is able to come into that court to implead him, and that he may there be properly impleaded: but in pleading to the count he does not admit the writ to be good, yet if the count be vitious, the writ is consequently destroyed; for though the writ in itself may be good, yet it is ill pursued: but in pleading to the writ he admits the count to be sufficient in form if the writ be good; since it is not to any purpose to object to the form of such writ if the form of the count be thereupon insufficient; but if the count be in substance variant, the defendant may show it at any time in arrest of judgment; because the court has no authority to proceed in a matter of substance different from the original writ.

Co. Lit. 303; Hob. 71, 73; Latch, 178; 5 Mod. 146.

If a man pleads to the action of the writ he allows both the form of the count and of the writ; for he admits, that if the form of the writ and count were adapted to the plaintiff's case, that such form is good and sufficient; since to object to the action not agreeing with the plaintiff's case does admit, that if it be ruled by the court that it does, the plaintiff has before the court a count in form sufficient.

If the defendant pleads in bar to the action, he admits the form of the writ and count, for he answers to the right in demand, and puts that right in issue, and thereby admits that there is a sufficient form to put it in issue, and therefore, though a man pleads *non assumpsit modo et formâ*, yet the *modo et formâ* (a) does not traverse the form of the writ or count, but the substance of the promise; which is the true reason why another promise may be given in evidence different in time and place from that mentioned in the declaration, though not different in substance.

¶(a) As to the effect of these words, see Gilb. C. P. 51; Vin. Abr. tit. *Modo et Formâ*; Weathrell v. Howard, 3 Bing. R. 135.¶

## (B) The Declaration: And herein,

1. *The Nature thereof; and therein, of adding several Counts in the same Declaration.*

THE (b) declaration is an explanation of the plaintiff's writ, in which he expresses at large his complaint, setting forth the nature and quality of his case more fully than in the writ; and as it is the foundation of his suit, the law requires that it contain certainty and (c) truth, that the defendant may be able to make a proper answer thereto, and the court be enabled to give a right judgment thereon.

Plow. 84; Lil. Reg. 414. (b) In English it is called *declaration*, *count* from the French, and *narratio* in Latin. Co. Lit. 17 a, 304; Doct. Pl. 83,—and is the same with what the civilians call a libel. Co. Lit. 17 a. β Though declaration and count are frequently used as being synonymous, yet practice has introduced the following distinction; when the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called indifferently a declaration or count, though the former is the more usual term. But when the suit embraces two or more causes of action, (each of which of course requires a different statement,) or when the plaintiff makes two or more different statements of the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. Bouv. L. D. *Count*. In real actions, the declaration is most usually called a count. Stephen, Plead. 36. See Gould on Plead. c. 4, s. 2, 3, 4; Steph. Pl. 279; Doct. Pl. 178. γ (c) Must establish a title in the plaintiff, as well as destroy the defendant's; for the rule is, *melior est conditio possidentis*. Vaugh. 58, 60.

The plaintiff having set forth the causes of complaint particularly, the conclusion of his declaration is, *et inde producit sectam*, which was proffering to the court the testimony of the witnesses or followers; for according to

## (B) The Declaration.

*Fleta* (a) ancient law was, *quod nullus liber homo ponatur ad legem nec ad juramentum per simplicem loquelam sine testibus fidelibus ad hoc ductis, &c.*

(a) And from this it hath been said, the practice of annexing affidavits to bills in Chancery hath been introduced.—But this method in declarations is now disused. Doct. pl. 83.—And so is the practice of annexing affidavits to bills in Chancery, unless, perhaps, in a few very particular cases, required by statute.

An *audita querela* and a *scire facias* are in the nature of a declaration, for they set forth at large the cause of the plaintiff's action as a declaration doth.

Lil. Reg. 411; 7 Co. 25.

The gist, and every thing that is of the essence of the plaintiff's action, must be set forth in the declaration; and herein we may lay it down as a general rule, that that seems properly to be the essence of the action without which the court could have no sufficient grounds to give judgment; and this is to be determined in every action according to its nature.

Doct. pl. 85.

If the declaration be not a sufficient foundation to give judgment, this may be moved in arrest (b) of judgment after verdict, because judgment cannot be given when it appears, that, though the fact be found for the plaintiff, yet he has not sufficient cause of action.

(b) But mistakes in the declaration cannot be taken advantage of on a plea in abatement, but the defendant must demur. Salk. 212. But if the declaration varies from the writ, the defendant may plead in abatement; for he has abated his own writ by prosecuting it in a different manner. Cro. Eliz. 722; Cro. Ja. 654; Jon. 304. [As over of the writ cannot now be craved, such a variance cannot be pleaded in abatement; but if the declaration be erroneous in respect of some extrinsic matter, as the nonjoinder of proper defendants, *misnomer*, &c., the declaration being presumed to correspond with the writ, the defendant may plead this matter in abatement of the writ. 1 Bos. & Pul. 645, 647; 3 Bos. & Pul. 399.]

The declaration may be general or special; as, in debt upon an obligation, the plaintiff may declare on the penalty generally, or may set forth the condition, at his election

Doct. pl. 84.

If there are three in execution jointly at the suit of A, and all escape, in debt for the escape, the plaintiff may declare for the escape of all, and it will not be double, though the escape of any of them will be (c) sufficient to entitle him to the action.

Keilw. 68. (c) If one declares for an escape in a cause of action to 40s., and proves 30s., this is sufficient; *per Hale*. But in the book there is a *quere de hoc*, being special. 2 Lev. 85.

If in an *indebitatus assumpsit* the plaintiff declares for 100*l.* received to the plaintiff's use, and also upon an *insimul computasset* for another 100*l.* the same day, and the defendant pleads that the said several sums of 100*l.* are for one and the same cause of action, and likewise that the sum demanded is satisfied, this on demurrer will be good; for though it is frequent to lay a declaration for a debt several ways in an *assumpsit*, and it is not a good plea to say that the several sums are but only for the sum first mentioned, and so go on no further; yet when the defendant pleads over, that the very sum demanded is satisfied, it is a good plea; and if the two several hundred pounds were two distinct sums, the plaintiff might have replied so, and taken issue thereupon. (d)

Raym. 449, *Sheldon v. Clipsham*. (d) If the money was actually paid, *non assumpsit* would have been the proper plea; for, having fulfilled the promise, it is as if it had never existed.

## (B) The Declaration.

In an action for money won at play there were two counts; one setting forth a special agreement to play at such a game, and mutual promises of payment, which was right; the other was, that in consideration that the plaintiff won such a sum of the defendant at play he promised to pay it, which was adjudged ill, in that an *indebitatus* will not lie for money won at play. It was likewise held, that any thing in the first count which was right could not (a) help any defect in the second; for though they both were put in one declaration, yet they were as distinct as if they had been in two several actions. (b)

6 Mod. 128, *Smith v. Aiery*, adjudged, 2 Ld. Raym. 1034; 3 Salk. 14, pl. 1, 175, pl. 1; Holt, 329, pl. 4. (a) That a judgment cannot be reversed as to one count and affirmed as to another, Salk. 24; and vide 7 Mod. 148; 2 Ld. Raym. 841. (b) This was a case after verdict, for on a demurrer to the whole declaration, the court might have given judgment for plaintiff on one count, and for defendant on the other.

The plaintiff declared, that whereas the defendant, 6 Maii, 1695, for one hundred and twenty weeks' diet then past, had promised to pay him 7s. *per* week, and that the plaintiff *postea*, ss. 6 Maii, 1695, having found the defendant diet one hundred and twenty weeks then past, the defendant promised to pay the worth, and that it was worth 7s. *per* week; upon *non assumpsit*, and verdict *pro querente*, it was moved in arrest of judgment, that the weeks in the *quantum meruit* are not said to be *aliæ* than those laid in the special promise, so that the defendant is twice charged with the same thing; *sed non allocatur*; for they do not appear necessarily to be the same, and without necessity the court will not intend them so.

Salk. 213, pl. 3, *West v. Troles*. ¶ See 2 Ld. Raym. 842; 7 Mod. 148; Com. Dig. *Pleader*, (C), 33.¶

The plaintiff, after plea pleaded, or after the end of the second term, shall not add a new count to his declaration (as an *indebitatus assumpsit*, or the like) under pretence of amending his declaration.

Lil. Reg. 408; {1 Wils. 149, *Aubeer v. Barker*; 7 Term, 698, *Owens v. Dubois*; 2 Johns. Rep. 206, *Sackett v. Thompson*. See 3 Johns. Rep. 257, *Harris v. Wadsworth*.} ¶ But it is now the practice in K. B. to permit a new count to be added after the end of the second term, when the cause of action is substantially the same; though not for a different cause of action. *Tidd's Prac.* 698, (9th ed.)¶

{Several of the common counts in a declaration (as for money had and received, money laid out and expended, money lent and advanced, and goods sold and delivered) may be included in one count; and the plaintiff is not bound to prove all the causes of action stated, but will be entitled to recover *pro tanto*, should he prove only one of the contracts.

4 Johns. Rep. 280, *Bailey & Bogert v. Freeman*; 2 Saund. 122 a, note (3) by Serjt. Williams.}

¶ In a declaration on a promissory note, an omission of the place where it is payable is fatal.

*Sebree v. Dorr*, 9 Wheat. 558.

In debt for a penalty on a statute, the declaration must conclude against the form of the statute, and the omission will be fatal on error.

*Cross v. The United States*, 1 Gallis. 26; *Sears v. The United States*, 1 Gallis. 257; *Smith v. The United States*, 1 Gallis. 261. See *Kenwick v. The United States*, 1 Gallis. 268.

The declaration upon a note assigned after the day of payment, should contain an averment that the money was not paid between that day and the day of assignment.

*Tynch v. Barr*, Pr. Dec. 197.



## (B) The Declaration.

The continuance of a nuisance can be laid only to the day of the imputation of the writ, not to the filing of the declaration.

Langford v. Owsley, 2 Bibb. 217.

The declaration on a covenant "to pay four hundred dollars' worth of merchantable whisky, in good casks, as specified in our agreement of this date, at forty-two cents per gallon," need not set out the covenant referred to.

Jackson v. Sagaur, 3 Monr. 27.

Where T B signed a note of the following import, namely, "Twelve months after date, I promise to pay E W eighty-five dollars in common wealth's paper; it being for a clock I got from W A, and the clock is insured to keep good time till the money is paid, or another clock that will keep good time by said A;" and the declaration stated the writing as for commonwealth's paper, without mentioning the warranty of the clock which it recites, it was held good.

Warner v. Broddus, 2 J. J. Marsh. 264.g

## 2. Who may join or be joined in the same Declaration.

§ In considering the parties who may be joined in a declaration it will be proper to consider, first, actions on contracts, and, secondly, actions arising on wrongs or injuries, *ex delicto*.

§ 1. What parties must join in actions *ex contractu*.

This head will be subdivided, by considering, first, when several persons must be joined as plaintiffs, and, secondly, when they must be joined as defendants.

## 1st. When several must join as plaintiffs.

It will be proper to consider under this subdivision, 1. The number of the original obligees or covenantees who must join; 2. The case of executors or administrators, heirs and assignees; 3. In case of marriage.

1. When a contract is made with several, if their legal interests were joint, if living, they must all join in the action for a breach of the contract.

1 Saund. 153, n. 1; 8 T. R. 140; 10 East, 418; Yelv. 177, note (1); Sweigart v. Berk, 8 S. & R. 308; Mehaffy v. Lytle, 1 Watts, 314; Wright v. Post, 3 Conn. 142; Russell v. Stocking, 8 Conn. 236; Potter v. Yale College, 8 Conn. 52; De Wolf v. Harris, 4 Mason, 515; Woodworth v. Spaffords, 2 M'Lean, 213.

A B, one firm, and C D, another, became sureties for E, and all joined in giving a joint and several note for the debt of E, which was afterwards paid by A B and C D; they cannot jointly recover against E, without proving that payment was made out of the joint funds of A B and C D.

Boggs v. Curtin, 10 S. & R. 211. See Russell v. Tomlinson, 2 Conn. 206.

Either of the promisees in a note made payable to J S, H N D, E I L, or D S, may bring an action upon it; a suit brought on such a note by D S alone was sustained.

2 M'Lean's R. 139.

In an action by two plaintiffs for work and labour as attorneys, who carried on the business as partners; held, that the defendant could not object, that by a contract *inter se*, one was to be secured a certain portion of the profits at all events, the debt in the first instance being the joint property of both.

Bond v. Pittard, 3 Mees. & W. 357; Waugh v. Carver, 2 H. Bl. 246.

## (B) The Declaration.

When one or more of several obligees, covenantees, partners or others, having a joint interest in the contract, not running with the land, dies, the action must be brought in the name of the survivors, and that fact must be averred in the declaration.

1 Dall. 65, 248; 4 Dall. 354; 2 Johns. Cas. 374; 1 East, 497.

Two of three tenants in common cannot maintain a joint action against the third to recover their proportion of the rents received by him. Each, having a separate interest, must sue for his own share.

M'Creary v. Ross, 7 Watts, 483.

The cause of action must be correctly stated in the declaration; and if it was a promise to several persons jointly, which, by the death of the others has survived to the plaintiff, he must declare accordingly.

Vandenheuvcl v. Storrs, 3 Conn. 203.

An agreement was made between S A, W E, and the firm of J C J & Co., of the city of P, of the one part, and N D, the defendant, of the other part, by which they agreed to enter into the china trade for a certain period, the parties of the first part agreed to furnish capital and to send ships yearly to Canton; the defendant, on his part, agreed to furnish his services in selling the goods at Canton, and investing the proceeds in return cargoes separately consigned in proportion to their respective shares to the parties resident at P. The defendant was not to bear any part of the loss on dry goods, but was to share in the profit of their sale, and have a commission on the specie as well as other parts of the cargo. Held, that a joint action for money had and received might be maintained by the parties of the first part against the defendant to recover the proceeds of the sales of dry goods.

Archer v. Dunn, 2 Watts & Serg. 237.

In Connecticut, a town may sue by the description of A B, and the rest of the inhabitants of such town, instead of using the corporate name.

Barkamsted v. Parsons, 3 Conn. 1.

In a suit by a mercantile firm, the names of the individual partners must be stated; thus, where the declaration commenced in this manner, "A, B, C and Company complain," &c., it was held to be bad on general demurrer.

Bentley v. Smith, 3 Caines' Rep. 170. But such a defect would be cured by verdict. Pats v. Bacon, 6 Munf. 219.

Where a note was made to a firm composed of A and B, and one of the partners released to the other, the latter was held entitled to sue alone.

Snead v. Mitchell's executors, 1 Hayw. 289.

Tenants in common must all join in an action of *assumpsit* for a tort which is waived.

Gilmore v. Wilbur, 19 Pick. 120.

Tenants in common cannot join in an action against the vendor for a fraudulent assertion as to the value of the property.

Baker v. Jewell, 6 Mass. 460.

In an action upon a contract of mateship entered into by the masters of two whaling ships, the officers and crew cannot join as co-plaintiffs with the owners.

Grozier v. Atwood, 4 Pick. 234; Baxter v. Rodman, 3 Pick. 435.

Partners must all join in an action for the price of goods sold in the name of one only.

Holliday v. Daggett, 6 Pick. 359. But this rule does not apply to a dormant partner. Lord v. Baldwin, 6 Pick. 348.

## (B) The Declaration.

When several owners of a vessel are interested in the cargo, they are properly joined in an action against a factor for the balance of the proceeds, as settled by one of them, the account being stated as with the owners.

Jellison v. Lafonta, 19 Pick. 244.

Sureties who pay a debt jointly or by a joint note, may join in an action against the principal.

Appleton v. Bascom, 3 Metc. 169; Chandler v. Brainard, 14 Pick. 285; 2 Metc. 561.

2. All the executors or administrators of the deceased whose right is sued for must join in the action, although some of the executors have refused to act.

1 Saund. 213; Went. 95; 1 Lev. 161; 2 Nott & M'Cord, 70; Hamm. on Parties, 272.

Several trustees, with distinct interests, cannot be joined in the same writ.

Atkinson v. Minor, 1 Tyl. 122.

Surviving promisees cannot be joined with the executors or administrators of a deceased co-promisec.

Smith v. Franklin, 1 Mass. 480.

3. In considering the cases where the husband and wife are plaintiffs in right of the wife, it will be proper to class them with reference to rules which, 1st, require them to join, and, 2dly, allow them to join or not at their election.

1st. In general, the husband and wife must join to recover the choses in action of the wife, when the cause of action would survive.

3 T. R. 348; 1 M. & S. 180; 1 Yeates, 551; 1 P. A. Browne's R. 263.

Where a conveyance was made by a defendant during the pendency of an action instituted by husband and wife, for slander on her, with intent to defeat the claim for damages in such action; then the husband, in his own name, brought a *qui tam* action to recover the forfeiture inflicted by the statute against fraudulent conveyances; on demurrer to the declaration, it was held, that he was not entitled to recover, because the wife, being the party aggrieved, ought to have been joined with him in the suit.

2dly. When a party being indebted to a woman *dum sola*, after the marriage gives a bond to the husband and wife, in consideration of such debt, they may join, or the husband may sue alone on such contract.

1 M. & S. 180; 4 T. R. 616.

Husband and wife must join in an action of account for rents and profits of the wife's land accruing during coverture.

Lewis v. Martin, 1 Day, 263; *sed vide* 15 Johns. 479.

They may join in a suit on a bond conditioned for their maintenance for their joint and several lives.

Schoonmaker's Executors v. Elmendorf, 10 Johns. 49.

2dly. When several defendants must be joined.

It will be proper to consider, under this head, 1. When the action is brought against the original parties; 2. When against executors or administrators; 3. When husband and wife must be joined.

1. When a contract is entered into by several persons and an action is brought for a breach of it, they must all be joined as defendants, (a) though some be bankrupts, (b) or infants, unless the contract as to the latter be entirely void. (c)

(a) 1 Saund. 153, note 1; *Ibid.* 291 b, n. 4. (b) 2 M. & S. 23. (c) 3 Taunt. 307; 5 Johns. 160; Alexander v. M'Ginn, 3 Watts, 220; Nutz v. Reutter, 1 Watts, 233.

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On a joint and several bond, the plaintiff must sue all the defendants living, or only one, and not any intermediate number.

*Minor v. Mech. Bank of Alexandria*, 1 Pet. 67.

On a note signed thus: C. Stump & Co., a suit may be maintained against C. Stump alone, and the declaration may set out the note as made by him.

*Gratz v. Stump*, Cooke's R. 494.

When a joint contractor is dead, a suit for a breach of the contract must be brought against all the survivors.

1 Saund. 291, note 2.

2. When an action is brought to recover on the contract of a person deceased, all his executors or administrators must be joined, and if one be a married woman, her husband must also be joined.

Cro. Ja. 519.

Heirs and assigns by deed are jointly chargeable for breach of a covenant real of their ancestor.

*Morse v. Aldrich*, 1 Metc. 544.

When the contract was made by which several persons became jointly liable, the executors or administrators of the survivor must be made parties.

*Hamm. on Part.* 156.

3. The cases where the husband and wife are defendants will be considered with reference: 1. To those where they must be joined; 2. Those where they may or may not be joined.

1st. When a feme sole who has entered into a contract marries, the husband and wife must, in general, be jointly sued.

7 T. R. 348; All. 72; Keb. 281; 2 T. R. 480.

2dly. When the husband, in consequence of some new consideration, undertakes to pay the debt of his wife, *dum sola*, he may be sued alone, or the husband and wife may be made joint defendants.

All. 73; 7 T. R. 349. But he cannot be sued alone unless there has been such new undertaking. *Angel v. Felton*, 8 Johns. 115, (2d ed.); *Gage v. Reed*, 15 Johns. 403.

When the promise is alleged to have been made by both during the coverture, the husband and wife cannot be joined in an action of *assumpsit*.

*Edwards v. Davis*, 16 Johns. 281.

When the husband and wife execute a conveyance of land containing the usual covenants, the wife cannot be joined in an action for the breach of such covenants, she having no other interest in the subject of the contract than the contingent right of dower.

*Whitbeck v. Cook*, 15 Johns. 483. See 17 Johns. 167; 7 Mass. 14, 291.

### § 2. What Parties must be joined in actions *ex delicto*.

It will be proper to consider, first, who must join as plaintiff, and secondly, who must be joined as defendants.

#### 1st. When several must join as plaintiffs.

This head will be sub-divided, by considering, 1. When the wrong has been done to several persons; 2. In case of marriage.

1. In general when an injury is done to the property of two or more joint owners they must join in the action: and, even when the property is several,

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yet when the wrong has caused a joint damage, the parties must join in the action.

1 Saund. 291 g; Glover v. Austen, 6 Pick. 209. See Gilmore v. Wilbur, 12 Pick. 120; Hart v. Fitzgerald, 2 Mass. 509; Daniels v. Daniels, 7 Mass. 135.

Co-partners may join in an action for fraudulently recommending a person as worthy of credit, by which the firm was induced to give him credit.

Patten v. Gurney, 17 Mass. 182.

When personal reputation is the object affected, two or more cannot join as plaintiffs in the action, although the mode of expression in which the slander was couched comprehended them all, as, when a man addressing himself to three, said, You murdered Peter. The reason is obvious, no one has an interest in the character of the others; the damages are, therefore, several to each.

Dyer, 191, pl. 112; Cro. Car. 510; Goulds. pl. 6, p. 78.

2. For injuries to the person, personal or real property of the wife, before marriage, when the cause of action would survive to the wife, she must join in the action.

3 T. R. 627; Rolle's Ab. 347.

For an injury to the person of the wife during coverture, by battery, or to her character, by slander, or for any other such injury, the wife must be joined with the husband in the suit.

When the injury to the wife is such that the husband sustains a separate loss or damages, as, if in consequence of a battery, he is put to expense, he may sue alone. And for slander of the wife, when the words are not actionable, and the husband receives special damages, he may sue alone.

1 Lev. 140; 1 Salk. 119; 3 Mod. 120.

In detinue for a chattel of the wife, the husband and wife cannot join, if the husband has had actual or constructive possession after marriage.

Spices v. Alexander, 1 Ruff. 67. See 1 Murph. 41.

When the wife is joined as co-plaintiff, the nature of her interest must appear in the declaration, or it will be bad on demurrer.(a) Unless, from the nature of the case, an interest is implied.(b)

(a) 2 N. R. 405. (b) 2 M. & S. 393; Staley v. Barhite, 2 Caines, R. 221.

2dly. When in actions *ex delicto*, several defendants must be joined.

Under this head will be classed the cases: 1. When several wrongdoers may or may not be joined. 2. When husband and wife must be joined.

1. There are torts, which, when committed by several, may authorize a joint action against all the parties; but when, in contemplation of law, several cannot concur in the act complained of, separate actions must be brought against each. The cases where several persons join in the publication of a libel, a malicious prosecution, or an assault and battery, are of the first kind; verbal slander, of the second.

6 Johns. R. 32.

In general, when the parties have committed a tort, which might be committed by several, they may be jointly sued, or the plaintiff may sue one or more or them, and not sue the others at his election.

Roll. Abr. 707; 3 East, 62; Withington v. Eveleth, 7 Pick. 106; Campbell v. Phelps, 1 Pick. 62; Sumner v. Tileston, 4 Pick. 308; Patten v. Gurney, 17 Mass. 182; Hill v. Davis, 4 Mass. 137; Burnham v. Webster, 5 Mass. 266.

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2. In actions for the torts of the wife *dam sola*, the husband and wife must be joined.(a) And they must be jointly sued for the torts of the wife after marriage.(b)

(a) Hawk v. Harman, 5 Binn. 43. (b) See tit. *Baron and Feme*, (L.), vol. ii. page 61.

Trespass *quare clausum fregit* will lie against husband and wife for a joint trespass by both.

Wright v. Kerr, Addis. 13.

When the husband is sued as administrator, in right of his wife, she must be joined.

Moore v. Sattril, 1 Hay. 16

It seems husband and wife cannot join in a *qui tam* action against persons named as executors for not returning the will to the probate office.

Hill v. Davis, 4 Mass. 137.g

See upon this division, tit. "ACTIONS IN GENERAL, (C)."

## 3. What Matters may be joined in the same Declaration.

[The old opinions upon this subject may be found in the first volume of this work, under title "ACTIONS IN GENERAL, (C)."] It would be unnecessary to introduce them again here, especially as the rule is now settled, that any causes of action which can be comprised in counts that admit of the same general plea, and are followed by the same judgment, may be joined in the same declaration.(c)

Brown v. Dixon, 1 Term R. 276.] [(c) But this rule though true, as far as it extends, is not a sure test in all cases as to what counts may be joined, and what may not; for debt on bond or judgment may be joined with debt on simple contract, although the pleas are different, and debt may be joined with *detinue*, although the pleas, as well as the judgments, are different. 2 Saund. 117 b.] β See Smith v. Lowell, 8 Pick. 178; Van Deusen v. Blum, 18 Pick. 229.g

In trespass *quare vi et armis* the defendants entered his close, containing one hundred acres, &c., (in which a fair time out of mind had been kept on Michaelmas day,) *et adhuc et ibidem fregerunt et divulsur*. divers booths, &c., *ibidem erect*. by the plaintiff for exposing wares and merchandises to sale there, brought by persons thither resorting, *nec non eo quod* (these defendants) *adhuc et ibidem impediverunt et disturbaverunt* the plaintiff in erecting other new booths, &c., for the sale of merchandise; by reason whereof the plaintiff lost all the profits of pittance and stallage. Upon not guilty pleaded, the plaintiff had a verdict, and on a motion in arrest of judgment it was objected to the declaration, that the latter part thereof, viz.: the disturbance in building new booths, founds altogether in case and not in trespass, and is therefore incompatible with the first part of the declaration, which is trespass *vi et armis*, and that these several matters require several judgments; the first a *capiatur*, but the last a *misericordia* only, and therefore could not be joined in one declaration. *Sed per cur.*—The disturbance, &c., is laid only in consequence of the first trespass, &c., and it is of the same effect as a *per quod* in a declaration, which is often used in actions of trespass *vi et armis*, to let in the consequential damages, &c., and one plea goes to the whole; for if the defendant had pleaded a license from the plaintiff to enter the close, that would have been a good justification of the trespass.

Carth. 113, Drake v. Cooper, adjudged.

4 A complaint of an injury arising partly from a breach of contract and

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partly of misfeasance, to which the plea is not guilty, may be joined with trover.

Smith v. Rutherford, 2 S. & R. 358.

A count in trover may be joined with a count for not taking proper care of goods delivered to the defendant for safe keeping.

McCahen v. Hirst, 7 Watts, 175.

A count affirming that the defendant sold the plaintiff, who was a negro, as a slave, when in truth he was a freeman, may be joined with counts in *assumpsit* for money had and received, and money laid out, paid and expended.

Jones v. Conoway, 4 Yeates, 109.

In covenant, a count against executors made on their own covenant, by authority of testator's will, cannot be joined with a count on a covenant made by testator himself.

Strohecker v. Grant, 16 S. & R. 237.

Counts in trespass *vi et armis* and trover cannot be joined in the same declaration.

Cooper v. Bissell, 16 Johns. 146; Weeton v. Woodcock, 5 Mees. & W. 587; 7 Dowl. 853.

A count in debt on simple contract may be joined with a count in debt on judgment.

Union Manufacturing Company v. Lobdell, 10 Johns. 462.

A count generally for lands sold and conveyed, without any particular designation, is bad, and cannot be joined with the money counts.

Nelson v. Swan, 13 Johns. 483.

Several counts were joined in the same declaration, the *gravamen* in each of which was a tortious breach of the defendant's duty as an attorney, as well as of the implied promise arising from an employment for hire; held that the counts were not incompatible.

Church v. Mumford, 11 Johns. 479.

A count for trespass damage feasant, may be joined in the same declaration with a count for pound breach or rescous.

Baker v. Dumbolton, 10 Johns. 240.

A count for a breach of a contract, and for a tort or breach of covenant, cannot be joined in the same action.

Clinton v. Hopkins, 2 Root, 225; Stoyel v. Westcott, 2 Day, 418.

Several penalties incurred by a single act, may be sued for in one action, when the court has jurisdiction of the aggregate sum.

Barkansted v. Parsons, 3 Conn. 1.

Counts for work and labour by the plaintiff as administrator, may be joined with counts for goods sold and work done by the intestate.

Edwards v. Grace, 2 Mees. & W. 190; 5 Dowl. 302.

In *assumpsit* on a contract for the hire of a steamboat, to use in a proper manner, and not for illegal purposes, assigning as a breach in one count the using it for hostile purposes of war against a foreign state, and a second breach for wrongfully detaining it there for a long period, the court refused to strike out either count, which might prove the greater cause of action.

Bleaden v. Rapallo, 9 Dowl. 857.

When one count in a declaration, on a charter-party, alleged a breach in not receiving on board part of the goods according to the terms of the agree-

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ment, and a second, for negligence and loss between the shore and the ship, to which the charter-party might not be applicable; held that both were necessary.

Vaughan v. Glenn, 5 Mees. & W. 577: 8 Dowl. 396.

Counts for trespass *quare clausum fregit* and *de bonis asportatis* may be joined.

Parker v. Parker, 17 Pick. 236; Bishop v. Baker, 19 Pick. 517.

Counts in debt on a specialty and simple contract may be joined.

Smith v. Lowell, 8 Pick. 178; Van Dusen v. Blum, 18 Pick. 229.

Counts in case and trover may be joined.

Ayr v. Bartlet, 9 Pick. 156.

A count for a malicious prosecution may be joined with counts for bringing a suit in the name of a third person, maliciously and without authority.

Pierce v. Thompson, 6 Pick. 193.

Counts on demands due to the plaintiff, as survivor of several firms, may be joined.

Stafford v. Gold, 9 Pick. 533.

Counts upon different joint and several bonds may be joined in an action against a person who is liable on all the bonds.

Wood v. Hayward, 13 Pick. 269.

When the form of action is the same, a count for double damages under a statute may be joined with a count at common law.

Fairfield v. Burt, 11 Pick. 244; Worster v. Canal Bridge, 16 Pick. 541.

A count on a promise by the testator may be joined with a count for the funeral expenses, though alleged to have been incurred at the request of the executor.

Haggood v. Houghton, 10 Pick. 154.

In *assumpsit* by an administrator *de bonis non*, counts on a promise to the deceased, to the former administrator, and to the plaintiff, may be joined.

Sullivan v. Holker, 15 Mass. 374. See Clark v. Lamb, 6 Pick. 512.

When, in different counts for the same cause of action, there is a material difference in the form, or when the demands are averred to be for the purpose of enabling the plaintiff to avail himself of different modes of proof, the court will not order any of the counts to be struck out.

Pierce v. Thompson, 6 Pick. 193.

## 4. Of the Declaration's agreeing with the Writ.

The count or declaration is an exposition of the plaintiff's writ, and must regularly agree therewith; and herein the general rule is, that every thing that comes within the compass of the writ may be comprehended within the declaration, but the declaration cannot be extended beyond the writ; for original writs, issuing out of Chancery, are the grounds and foundations of the proceedings of the courts into which they are returnable; and such proceedings must be conformable to the authority given them; whatever therefore may be comprised in the writ, however multifarious, may be comprised in one declaration; but whatever cannot be contained in one writ, cannot be comprehended in the declaration.

Doct. pl. 84; Lil. Leg. 411.  $\beta$  After the defendant has pleaded it is too late to take advantage of a variance between the writ and the declaration. Garland v. Chattle, 12 Johns. 430.



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¶ Variances between the writ and declaration are matters pleadable in abatement, and cannot be taken advantage of on general demurrer to the declaration.

Duval v. Craig, 2 Wheat. 45.<sup>g</sup>

The writ may be general, according to law, but the declaration special; as where a statute gives an action but does not prescribe any form of the writ, the writ framed by the common law will serve, and the special matter may be set forth in the declaration.

Doct. pl. 84.

So if lands are given to a woman *quamdiu sola fuerit*, or to a man *quamdiu se bene gesserit*, in waste, the writ shall be general *quod tenet pro termino vite*, and the count special.

Doct. pl. 85.

[Upon general process (a) the plaintiff may declare *qui tam*, or as executor or administrator, &c., || or the defendant may be declared against in his representative character.(b)] But this rule will not hold *è converso*; for where the process was to answer the plaintiff *qui tam*, &c.,(c) and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings. And the like was done, where the process was to answer the plaintiffs (d) as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a special character. || So where the writ was by the plaintiffs as executors, and the declaration was by them in their own right, it was deemed a sufficient variance for discharging the defendant out of custody on filing common bail.(e) And as such variance between the original writ and declaration may be taken advantage of by plea in abatement, so where the action is by bill, the court will interfere upon motion.(g)

(a) *Weavers' Company v. Forrest*, B. R., 2 Stra. 1232; *Lloyd v. Williams*, C. B., 2 Black. R. 722; 3 Wils. 141; {2 Cain. 134.} || (b) 6 Moo. 66; 3 Brod. & Bing. 4, S. C. || (c) *Canning v. Davis*, B. R., 4 Burr. 2417; *Canning v. Davis*, C. B., Barnes, 494. (d) *Mega v. Ford*, E. 25 G. 3; Imp. Pr. K. B. 172. {So where the process was to answer the plaintiffs as executors, and the declaration was in their own right. 8 Term 416, *Douglas and others v. Irlam*.} || Tidd, 450, (9th ed.) (e) 8 Term R. 416; and see 3 Wils. 61; 1 Bos. & P. 383. || *Turing v. Jones*, 5 Term R. 402. — (g) It appears, however, to have been the opinion of Yeates, J., in the case of *Canning v. Davis*, 4 Burr. 2417, that though the plaintiff style himself *executor*, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same.]

|| The plaintiff may declare in chief, upon common process by bill in the King's Bench, or on a common *capias quare clausum fregit* in the Common Pleas,(h) for any cause of action whatever.(i) And where the process was in trespass and assault, and the declaration in trover, the variance was deemed immaterial.(k) But in bailable cases the declaration should regularly correspond with the *ac etiam* in the writ, as to the nature of the cause of action. Therefore where the plaintiffs, having held the defendant to bail on an affidavit in *assumpsit*, delivered a declaration in trover, the Court of King's Bench ordered an *exoneretur* to be entered on the bail-piece.(l) But they will not permit a defendant to take advantage of a variance in the amount of debt, between the *ac etiam* part of the *libital* and the declaration.(m) And though, where there is a material variance between the *ac etiam* in the writ and the declaration, the plaintiff will lose his bail,(n) yet the court will not on that ground set aside the proceedings for irregularity.(o) It should

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also be remembered that, in the Common Pleas, a variance between the writ and count, the *ac etiam* being in case on promises, but the declaration in debt, is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l.*(*p*) By original, the plaintiff must declare in chief, for the same cause of action as is expressed in the writ;(q) and if there be a variance between the original writ and declaration, the court will discharge the defendant on entering a common appearance.(r) But they will not on this ground set aside the proceedings; for that would be permitting the defendant to do indirectly what the practice of the court will not allow him to do directly, by cravingoyer of the original writ, and pleading the variance in abatement.(s)

(h) Pr. Reg. 137; Cas. Pr. C. P. 58, S. C. (i) R. E. 15 G. 2, Reg. 1, K. B.; Cowp. 455. (k) 2 Chit. R. 166. (l) 7 Term R. 80; and see 8 Term R. 27. (m) 5 Term R. 402. (n) Tidd, 294. (o) Per Cur. Mich. 43 G. 3. K. B., 2 Moore, 89; 8 Taunt. 189, S. C.; and see 2 Moore, 301; 8 Taunt. 304, S. C., C. P. (p) 1 H. Black. 310. (q) R. Hil. Car. 1, K. B.; 5 Term R. 402. (r) 6 Term R. 363; but see 2 Moore, 301; 8 Taunt. 304, S. C. (s) Ibid. 2 Wils. 339; Durant v. Serocold, E. 24 G. 3, K. B.; but see 5 Term R. 722; 4 East, 89; 2 New R. C. P. 82; 5 Taunt. 649; 1 Marsh. 274.]]

If a man bring an original in trespass against one, and declare against him with a *simul cum*, he abates his own writ;{<sup>1</sup>} but the defendant cannot take advantage of it without demandingoyer. If the writ be against two, the plaintiff may declare {<sup>2</sup>} against one of them with a *simul cum*.(a)

Comb. 266, per Holt, C. J. {<sup>1</sup>} A verdict cures the defect. 1 Lev. 41, Henley v. Broad; 2 Johns. Rep. 368. {<sup>2</sup>} See 2 Johns. Rep. 365, Rose v. Oliver and others. 1 Sam. 291 d, note.—Process against several; declaration may be against one only, if process is not bailable; *aliter* if process is bailable. See 3 Johns. Rep. 538; 1 Bos. & Pul. 19, 49; 5 Bos. & Pul. 82; 4 East, 589. If process is sued out in the name of one plaintiff, and declaration be delivered in the name of two, it is bad. 1 Bos. & Pul. 383.} (a) But now, on trial, the court will expect some evidence of an attempt to serve with process, to take off his evidence.

||Formerly the plaintiff was allowed to join several defendants for separate causes of action in one writ, and to declare against them separately; and this he may still do where the process is not bailable, but not where the process is bailable; for if the affidavit of debt and the process are joint against several, the declaration must be joint also.

Tidd's Prac. (7th edit.) 169, 455, and authorities there cited.]]

If lands be demised for term of half a year or a quarter of a year, &c., and the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum*, but the declaration must be special, according to the case.

Lit. § 67; Co. Lit. 54 b.

So if a clerk that is donative be disturbed in a *quare impedit* by the patron, for this disturbance to his church donative the writ shall say, *quod permittat eum presentare ad ecclesiam*, &c., and the declaration shall be special.

Co. Lit. 344 a.

Where the (b) title is of one sort of action, there the declaration can never change it to another; but it may make a fatal variance between the writ and the declaration.

Cases Law and Eq. 210. (b) If a declaration begins, *Queritur in placito transgressionis pro eo quod*, &c., yet may it be a declaration in case, notwithstanding the recital of the bill be in *placito transgressionis*, for that will serve indifferently for trespass or case. Cro. Car. 325, Tyffin v. Wingfield.—But for this vide Hob. 180; Allen, 84; Cro.

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Car. 254; 2 Roll. R. 49; Vent. 19. ¶And it seems the statement of the cause of action in the *queritur* is superfluous in proceedings by *bill*, and may be rejected. 11 East, 62, 65.¶

β The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each: held, irregular.

Pepper v. Whalley, 1 Bing. N. R. 71; S. C. 2 Dowl. P. C. 821.

A writ was general and the declaration special, as assignee; held that this was not such an irregularity as to require that they should be set aside.

Knowles v. Johnson, 2 Dowl. P. C. 653. See Ashworth v. Ryall, 1 B. & Adol. 19.

A writ was to answer the plaintiff in an action on the case, declaration was in trover; held irregular.

Bate v. Baulton, 4 Dowl. P. C. 161.

The writ of summons was in an action "on promises," and those words were omitted in the declaration, but it appeared to be a good declaration in *assumpsit*: held, not to be an irregularity.

Straghan v. Buckle, 1 Harr. & Wol. 519.g

5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gist of the Action: And herein,

1. Where by the Declaration it must appear that the Plaintiff hath a Right.

It is a general rule in pleading that the declaration must show a title in the plaintiff; and that it is regularly true that if the (a) plaintiff will himself discover to the court any thing whereby it may appear that he had no cause of action (b) when he commenced it, {'} his writ shall abate. {'}<sup>2</sup>

Hob. 109; Palm. 524. {'} Issuing the writ is, in New York, the commencement of the suit. 1 Cain. 69; 3 Cain. 133; 1 Johns. Rep. 285; 2 Johns. Rep. 342; 3 Johns. Rep. 42. Filing the bill is, in the King's Bench. 4 East, 75.—{'} The declaration is bad on demurrer. 1 Cain. 69; 3 Johns. Rep. 42, Cheetham v. Lewis. And the defect is not cured by verdict. Carth. 113, Vonables v. Daffe; 3 Johns. Rep. 42.} (a) Diversity where such matter is disclosed by the defendant. Cro. Eliz. 111; Leon. 87; 2 Leon. 20; {1 Cain. 272, 273, Baker v. Arnold. In Swancott v. Westgarth, Lord Ellenborough permitted the defendant to prove it on the trial, and a verdict was then given for him. 4 East, 75; 2 Dall. 242, Ralson v. Bell, acc. But see 1 Johns. Ca. 393, Crygier v. Long.} (b) Where the *teste* of original was before the day of payment in the condition of the bond, upon which action was brought; and this, though after verdict, was adjudged error. Cro. Eliz. 325; Moor, 598, Buckley v. Williamson; et vide Cro. Eliz. 565.—So in case for scandalous words, the day was alleged before the words so spoken. Roll. Abr. 792.\*—\*The day is not material if laid before suing out writ, if in C. P., or by original in B. R., or before the first day of the term, whereof the declaration is, if by bill, ¶for the plaintiff may give in evidence any cause of action before the filing the bill, though after the issuing the latitat. Cowp. 455.¶ β In an action on a parol contract, the day laid in the declaration is not material upon evidence. Staut v. Russel, 2 Yeates, 334. But if the day be laid after bringing the action, and be past at the time of trial, it will be fatal. Charles v. Delpux, 2 P. A. Bro. 319. See Stewart v. M'Bride, 1 S. & R. 202; Gordon v. Kennedy, 2 Binn. 287.g So, in *assumpsit*, where it appeared by the declaration, that the action was brought before the cause, the declaration was held ill. Cro. Car. 574, 575.—In ejectment by the declaration it appears that the defendant was ejected after the lease made, it is sufficient, though no certain day is alleged in which he was ejected; for the day is not material, being before the action brought. Cro. Ja. 311.—In ejectment the plaintiff declared, upon a lease made 19 Jun. *habend. a dicto duodecimo die Jun., virtute cujus*, he entered, and that *postea scilicet eod. 12<sup>o</sup> die Jun.* the defendant ejected him; and because the plaintiff by his own showing entered as a disseisor, and the defendant ejected him before he had title, after a verdict and judgment for the plaintiff in Ireland, upon a writ of error here it was reversed. 3 Mod. 198, Evans v. Croker; et vide Comb. 83, like point.—But the words subsequent to *postea* might have been rejected as surplusage. Adams v. Goose, Cro. Ja. 96; Bull. N. P. 106.—Where the declaration being of

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the term generally shall refer to the first day.—That some day must be alleged before the action brought. 5 Mod. 287. And note; if the cause of action arises on some day within the term of which the declaration is delivered, the declaration must be of some day in the term after the cause of action accrued. [And in such case, if the suit is by bill, there must be a special memorandum of the day subsequent to the cause of action. However, where the cause of action was stated to have accrued on the first day of term, the court, on demurrer, held, that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered before the sitting of the court; so that the cause of action might well have accrued before the actual delivery of the declaration. Pugh v. Robinson, 1 Term R. 116. {If there is not a special memorandum, the court will give leave to amend by inserting it, even after error brought. 7 Term, 474, Dickinson v. Plaisted.}]—The declaration by bill should, regularly, be entitled of the day on which the writ is returnable; for the bill, of which it is a copy, cannot be filed till bail is put in, which cannot be till the return of the writ. Southouse v. Allen, Ca. temp. Hardw. 141. But *qu.* as to the time of putting in bail: and see Tidd's Pr. 187.—Where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in. Stork v. Herbert, 1 Wils. 242. But in a later case it hath been holden that a declaration, though filed and delivered, cannot be entitled of a subsequent term to that in which the writ is returnable, [so that the plaintiff cannot recover for any cause of action subsequent to the term when the writ is returnable, though before the actual filing of the declaration.] Smith v. Muller, 3 Term R. 624.—Where a declaration is improperly entitled, the plaintiff may have it corrected on an affidavit of the fact. Symonds v. Parmenter, 1 Wils. 78. It may be set right too at the instance of the defendant, if necessary for his defence. Southouse v. Allen, Ca. temp. Hardw. 141; Smith v. Key, 1 Str. 638; Smith v. Raydon, cited 1 Wils. 39, seems S. C.; Thompson v. Marshal, 1 Wils. 304; Wilkes v. Earl of Halifax, 2 Wils. 256.] [Vide Tidd's Prac. (7th edit.) 430, 431.]

Hence it hath been adjudged on the statute of hue and cry, that it is not sufficient for the plaintiff to declare that the goods were in his custody, but he must allege that they belonged to him; but that in the case of a carrier, he may maintain an action against the hundred setting forth the custom by which he is chargeable.

2 Saund. 379.

So in an action upon the case the plaintiff cannot declare *quod cum* the defendant was indebted to him such a sum, the defendant in consideration thereof *super se assumpsit* to pay, &c., without showing the cause of the debt.

10 Co. 77 a. But for this, vide Hob. 5; Godb. 186; Cro. Ja. 207, 213, 642; Hob. 18; Moor, 854, pl. 1167; Hetl. 106; Roll. R. 391; Bulst. 67; 3 Bulst. 207; Cro. Ja. 397; Hard. 132.—But 171, *per* Croke and Chamberlain, there is a diversity where the promise is to pay at a day to come, and where not; for a promise to pay at a day to come implies a forbearance in the mean time; and vide Roll. R. 396.—And that such a declaration is not made good by verdict. Cro. Car. 631; Sid. 182; Brownl. 14; Poph. 31; Jenk. 293.—Where the plaintiff declared that the defendant was indebted to the testator of the plaintiff in 20*l.* *quas illi solvise debuit secundum agreementum inter eos habit.*; the judgment was stayed after verdict, for that the agreement might be by deed. 2 Lev. 162.

But if in an *assumpsit* the plaintiff declares that whereas the defendant was indebted to him in 30*l.*, the defendant, in consideration that the plaintiff had given day to the defendant until, &c., did assume and promise to pay, &c.; this is a good declaration, without showing for what the defendant was indebted, for the debt is not in question; and though it be true, there must be a debt to make this a good consideration; yet that is allowed in the promise being actual.

Hob. 18, Woolaston v. Webb, adjudged after verdict; and vide like point, Cro. Ja. 397, 548, 593; Moor, 853, pl. 1167; 3 Bulst. 206, 207; Roll. R. 379, 380; Godb. 13; Hob. 216; Roll. Abr. 19.

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So if in an *assumpsit* the plaintiff declares, that whereas the defendant had received 24*l.* of several persons to the use of the plaintiff, in consideration thereof the defendant did assume and promise to pay, &c.; this is a good declaration, without showing of what persons in particular he received the money, because the consideration is executed, and not traversable.

Moor, 854, pl. 1168.

If in an *assumpsit* the plaintiff declares that the defendant, in consideration of, &c., *inter alia* did assume to pay, &c.; this has been held no good declaration, because he ought to set forth the whole promise, which is entire.

Allen, 5; and vide March, 100.

¶ In an action for a malicious prosecution, the declaration must set forth the special circumstances of malice, oppression, and injury.

Elkinton v. Deacon, 1 Penning. 160.

Special damages, not necessarily implied, cannot be recovered, unless specially stated in the declaration, and although the plaintiff has given evidence of special damages, without objection by the defendant, yet the defendant may object to their allowance on trial. Special damages, arising from breach of contract or for a tort, which necessarily arise from a breach or gravamen, need not be stated, as they are covered by the general damages in the declaration.

Bas et al. v. Steele, 3 Wash. C. C. R. 381.<sup>g</sup>

¶ But it is now settled to be sufficient if the plaintiff states in his declaration so much of the contract as shows the particular promise for the breach of which he complains. Thus where the plaintiff declared that the defendant warranted bacon sold to plaintiff to be prime bacon and of good quality, this was held sufficient, although it was also part of the warranty that the bacon was *singed* and of Strangeman's manufacture; for the plaintiff complained only of the inferiority of the quality. But the whole of the *consideration* moving to the defendant must be stated; for the consideration is entire, and it must be shown that it is entirely performed.

Cotterill v. Cuff, 4 Taunt. 285; and see Ward v. Smith, 11 Price, 19; Tempest v. Rawling, 13 East, 18; Squier v. Hunt, 3 Price, 68; Clarke v. Gray, 6 East, 564. ||

But in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant, and at such a day, &c., *insimul computaverunt* for all debts, reckonings, and demands; and the defendant upon the said account was found to be in arrear the sum of 20*l.*, in consideration whereof the defendant promised to pay, &c.; this is a good declaration, without showing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in pede computi* are reduced to a sum certain; and thereupon being indebted to the plaintiff, it is sufficient to ground an action.

Cro. Car. 116; Hetl. 106, 883, S. C.; and Poph. 177; Latch. 141; Palm. 442; Yelv. 70; Roll. R. 396, S. P.

In *assumpsit* the plaintiff declared, that the defendant was indebted 20*l.*, *pro præmio* upon a policy of insurance upon such a ship, and the defendant demurred specially, because he did not show the consideration certainly what the *præmium* was, or how it became due; *sed non allocatur*; for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good.

2 Lev. 153, Fawk v. Pinsack.

In *assumpsit* the plaintiff declared *pro opere et labore* generally, without

(B) The Declaration. (*Certainly and Particularity.*)

setting forth what sort or manner of work or labour it was; and though it was objected that it should be set forth particularly, so that it may appear to the court to be lawful work; yet the court held it well enough; and that the only reason why the plaintiff is obliged to show wherein the defendant is indebted is, that it may appear to the court that it is not a debt on (a) record or specialty, but only upon simple contract; and any general words by which that may be made to appear are sufficient. (b)

Carth. 276, adjudged; Vent. 44, S. P.; Sid. 425, S. P.; 2 Keb. 552, S. P.; Mod. 8, S. P. (a) For damages recovered in an *assumpsit* will be no bar to an action of debt grounded on a record or specialty. Cro. Car. 6; Leon. 155; Cro. Eliz. 242. ¶(b) Lord Holt used to say he was a bold man who first ventured on these general counts, though now they are of every day's experience. 2 Stra. 933; Carth. 276. They may be resorted to in all cases where the special contract is executed, and nothing remains to be done but payment of money. 12 East, 1; 1 Bos. & Pul. 397; and see 1 Will. Saund. 269 b. And all the common counts in a declaration may properly be included in one count, see 2 Will. Saund. 191 c.¶

If the bailiff of a liberty declares, that the franchise and liberty of returning and executing all writs, bills, and receipts out of the king's courts belongs to him; and that the defendant, without his license, and against his consent, executed a *fiery facias* within the said liberty, this is a good declaration, without setting forth any title, or that he enjoyed the said liberty by grant or prescription. Adjudged upon demurrer to such a declaration; for the court held, that if the defendant had taken issue, it would have been incumbent on the plaintiff to prove a title.

Show. 17, Cary v. Bachus.

So in an action for stopping a usual and convenient way to his (the plaintiff's) lands, the declaration was held good without showing a title.

2 Jon. 157, Hart v. Bassett; Carth. 85, S. C. cited.

So in an action on the case for diverting a watercourse, the plaintiff declared that the defendant *malitiosè, &c. infregit* a certain mill-dam, *et perinde* did divert the watercourse *ab antiquo et solito cursu erga* the corn mill of the plaintiff, by reason whereof he lost the profits of his said mill; but did not set forth that that water used to turn his mill, or that he had any other profit thereof, or that the watercourse was *antiquus aquæ cursus, &c.*, yet the declaration was held good; the court being of opinion, that the (c) possession alone was sufficient to maintain an action against a wrongdoer, and that this was of the same nature with an action of trespass. But Holt, C. J. said, that if the cause had been tried before him, the plaintiff should have proved his mill to be an ancient mill, otherwise he should have been non-suit.

Carth. 84; Show. 64; 3 Mod. 41; 3 Lev. 133, S. C.; Skin. 65, pl. 10, 175, pl. 5, Heblethwaite v. Palms. (c) Where in several cases possession without property is sufficient to maintain an action, vide Palm. 200; 4 Co. Lutterell's case, and tit. *Trespass*. ¶It is clearly now sufficient in declaring for not grinding at plaintiff's mill, or for disturbance of his common, way, watercourse, or other incorporeal hereditament or easement, to state only a possessory title in the declaration. See Willes, R. 654; 2 Will. Saund. 113; 1 Ibid. 346 a, and cases there collected.¶

In *assumpsit* it was, in consideration he permitted the defendant to take the profits of such lands for seven years last past, at his instance and request, the defendant promised to pay him as much as they were worth; and it was moved in arrest, &c., that the plaintiff had not set forth a title here as he should have done: but *per cur.* it is well enough; and to maintain such an action as this upon evidence, an actual promise must be proved.

Lev. 179; Sid. 279; 2 Keb. 8, S. C.; and Cro. Eliz. 859, S. P.

(B) The Declaration. (*Disturbance of incorporeal Rights.*)

An action upon the case was brought for stopping a way which the defendant had from such a place over Black Acre, where the nuisance is, unto such a field by name; and it was ruled to be good, without showing what interest he had in that field, for it shall be intended to be a common field; but otherwise, had it been *usque ad talem clausum*, there he ought to show what interest he has in the close.

Noy, 86.

In an action upon the case, supposing that he was seised in fee of the manor of H, and of a fair to be held there every Ascension-day, and that the defendant disturbed him to take toll, &c., the defendant pleaded not guilty, and found against him; it was moved in arrest of judgment, that the declaration was not good, because he does not show a title to the fair by grant or prescription, and therefore no cause of action; but *per cur.* not necessary, because only a conveyance to the action, and is not any claim thereof as to the right, as in a *quo warranto*, and the declaration without special title therein comprised, is good.

Cro. Ja. 43, 123; Dent v. Oliver, adjudged. [Bennington v. Taylor, 2 Lutw. 1517; Chafin v. Betsworth, 3 Lev. 190, S. P.]

[An action on the case was brought, setting forth that the plaintiff was possessed of a tenement, and a close of pasture, and a rood of land, &c., in S M, and that he had right of common in Mendip forest for his cattle, &c., as thereunto belonging; that the defendant digged and made coney-burrows in the said forest, and set nets and gins there, by which his sheep were damnified; and he was deprived of common, &c. It was objected that the declaration was not good, for that it rested merely upon possession, and did not show any title to the common, either by grant or prescription. But the declaration was adjudged to be proper. 1. Because it is an action grounded upon the possession against a wrongdoer; to which a title would be only an inducement. 2. Title to the common need not be alleged, because it did not appear whether the defendant was owner of the soil, or a stranger. It is true, if it had been upon special pleading, as in trespass for distraining his cattle, and the defendant had pleaded that he was owner of the soil, and so justified the taking, the plaintiff in such case must have replied, (a) and shown a title by grant, or prescription, or some conveyance. And lastly, This matter is not traversable; for upon the general issue a right of common must be proved and given in evidence, otherwise the plaintiff cannot maintain his action, but *what right* is not material.

Strode v. Byrt, 4 Mod. 418; Comp. R. 7; Skin. 621, S. C.; Dorney v. Cashford, 1 Ld. Raym. 266, S. P., Bean v. Bloom, 3 Wils. 456; S. P. ¶Vide 15 East, 108; 1 Taunt. 205; 1 Saund. 346, n. (2); 2 Will. Saund. 113.¶ (a) So, Vernon v. Goodrich, 1 Stra. 6.

So in an action for disturbing the plaintiff in the enjoyment of a pew in a church, possession and laying it to be appurtenant to a messuage (b) are sufficient against a mere stranger, without laying or proving the plaintiff repaired the pew, or showing any title or consideration whatever. As against the ordinary, indeed, who hath *prima facie* the disposal of all the seats in the church, a title must be shown in the declaration, and proved.

Kenrick v. Taylor, 1 Wils. 326. (b) In all cases it seems necessary to claim the pew in the declaration as appurtenant to a messuage. Stocks v. Booth, 1 Term R. 428. ¶Griffith v. Matthews, 5 Term R. 296; Mainwaring v. Giles, 5 Barn. & A. 356; 2 Saund. 175, c. d.¶

If a plaintiff have a prescriptive right of burial in a church, he need not,  
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against a wrongdoer, set forth the whole of it: it hath indeed been doubted whether he may not in such case rely merely upon his possession.

Waring v. Griffiths, 1 Burr. 440. [See Spooner v. Brewster, 3 Bing. 136.]

But where a person claims a servitude upon another's property, it is said in several cases that he must, against the owner of such property, set forth and prove the whole of his title. However, later cases seem to have gone otherwise.

Vide the cases *supra*.

The plaintiff declared that he was seised in fee of a mill, and had a watercourse running in the defendant's land to the said mill, and that the defendant had stopped it. This was holden well upon demurrer, without showing any title to the watercourse.

Sands v. Trefusis, Cro. Car. 575.

The plaintiff declared, that he was for four years last past seised in fee of a parcel of land adjoining to the defendant's meadow, *et sic inde seisitus per totum tempus predictum habere, frui et uti debuit quandam viam per quandam januam* of the defendant in the meadow of the defendant *usque* a close of the plaintiff, and that the defendant stopped the gate *cum serâ et catenâ*; and upon motion in arrest of judgment, the declaration was holden to be good, though no title was shown to the way, though the defendant was terre-tenant, and though the charge was against common right, and such a charge as could not commence but by grant.

Winford v. Wollaston, 3 Lev. 266; Warren v. Sainthill, 2 Ventr. 180, S. P.; Brookley v. Slater, 1 Lutw. 119, S. P.

In the case of the King v. Bucknall, Lord Holt said, "Where a man is obliged to make fences against another, it is enough to say *omnes occupatores* ought to repair, &c., because that lays a charge upon the right of another, which, it may be, he cannot particularly know."

2 Ld. Raym. 204.

In an action for not repairing a fence, the allegation was, that the tenants and occupiers of such a parcel of land adjoining the plaintiff's had time out of mind maintained it, &c. It was moved in arrest of judgment, that the prescription is laid in occupiers, and yet their estates are not shown; and that hath been judged naught in 1 Cro. 155, and 2 Cro. 665. But the court said, "It is true there have been opinions both ways, but it is good thus laid, for the plaintiff is a stranger, and presumed ignorant of the estate; but otherwise it is if the defendant had prescribed."

Anon. 1 Ventr. 264. [Vide 2 Saund. 114 b.]

So in an action on the case for not repairing a wall, "*debuit reparare*" hath been adjudged sufficient.

Tenant v. Goldwin, 1 Salk. 360; 2 Ld. Raym. 1089; 6 Mod. 311.

So in an action for not repairing a private road leading through the defendant's close, that the defendant as occupier is bound to repair.

Rider v. Smith, 3 Term R. 766.]

[So also in a declaration for not grinding corn at the plaintiff's mill, it is no longer necessary either to state the plaintiff's estate in the mill, or that there was custom for the defendant or inhabitants to grind there. But the plaintiff may declare generally on his possession, by reason whereof he is entitled to the toll of the corn ground, and that defendant occupied a messuage, &c., and by reason thereof *ought* to grind, &c., at the mill.

Drake v. Wiglesworth, Willes' R. 654; 2 Saund. 113 b, n.



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But it is to be observed, that all the above cases, as to declaring generally without setting out a title, establish merely a rule of *pleading*; for the plaintiff's *evidence* remains the same; and he must still prove his title at the trial, or he cannot recover.

Thus, in an action for not grinding at the plaintiff's mill, the plaintiff is bound to prove the custom, that the defendant is subject to it, and the breach of it. And the defendant does enough if he disprove any of them.

Doug. 223.

And the distinction between declaring against the owner of the soil and a wrongdoer is now done away; and in both cases the plaintiff may declare generally on his possession.

2 Saund. 114 a, n.; 3 Term R. 767.]

In debt upon a lease, the defendant may declare *quod dimisit*, and need not allege a seisin in himself when he made the lease.

Yelv. 48.

[In covenant on a lease, the plaintiff in stating his title set forth, that one S, who was seised in fee, made the lease in question, and that on his death the reversion descended to the wife of the plaintiff, as the heir-at-law of S, whereupon he (the plaintiff) became seised of the reversion, as of freehold, in right of his said wife. On demurrer, the declaration was holden to be ill; for, from his own showing, there was a seisin in fee in both in right of the wife.

Polyblank v. Hawkins, Dougl. 329.

In general, however, in covenant, the plaintiff need not set out any title, but begin generally *quod cum dimisisset*; and therefore where a plaintiff had merely set out his title imperfectly, as by omitting the person under whom he claimed, it was holden that this was surplusage, and could be rejected.

Aleberry v. Walby, 1 Stra. 229.]

In debt against lessee for years for the arrearages of rent reserved upon the lease, he need not declare that the lessee entered, for the contract is the ground of the action.

4 Leon. 18.

[In an action against a person who farms the post-horse duties under the statute of 27 G. 3, c. 26, for neglect of duty, the plaintiff must aver specifically that the defendant is the person appointed under and by virtue of the act of parliament upon whom the duty is thrown. It is not a sufficient title to state that the defendant is a collector of the rates and duties recited in a certain act, &c.

Short v. Pruen, 6 Term R. 163.]

In assumpsit the declaration must allege a promise, and a sufficient consideration.

Avery v. Inhabitants of Tyingham, 3 Mass. 160.

A declaration in *assumpsit* that "the defendant received of the plaintiff 29l. 6s. 8d. in orders on the 1s. tax, which he promised to return or account for," is insufficient; the declaration giving no rule to the court by which to ascertain the value of the orders, or assess damages for not delivering or otherwise accounting for them.

Grant v. Jackson, Kirby, 90.

In an action upon an implied promise to repay to the plaintiff money re-

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covered it out by the defendant, if the declaration alleges that the defendant received the plaintiff's money, — it is his use and it accords with him, therefore, it is not such a trespassing wrong as to make it lay out and stand in account of the plaintiff.

*Avery v. Linneman*, 10 Ky. 354.

When the gist of the action is that the plaintiff was possessed of personal estate, and lost it by means of the defendant's conduct, if the declaration merely states that the plaintiff was possessed of personal estate of the value of \$2000, without specifying such property by a particular description, the declaration will be bad for uncertainty.

*Phipps v. Hill*, 1 Day's Cases 314.

Declaration on a bond for the performance of an award, plea that the defendant, by writing sealed, revoked the power of the arbitrators, it need not aver notice to the arbitrators of the opposite party, this being implied in the terms revoked.

*Frost v. Frost*, 1 Cowen 225.

When a note falls due on Sunday, that being the third day of grace, it may be protested on the second day, and it is unnecessary to aver in the declaration that the third day happened on Sunday.

*Morgan's and Farmers' Bank v. Green*, 7 Wend. 460.

In an action, by a religious corporation, founded on a conveyance, the declaration need not aver a capacity in the corporation to take.

*Dutch Church of Schenectady v. Vedder*, 4 Wend. 494.

In an action for a libel, consisting of a caricature of a court-martial, of which the plaintiff was a member, on which certain words were written on labels apparently issuing from the mouth of the plaintiff's picture, the declaration alleged the libel to be of the court-martial, and the plaintiff as member thereof, and that they were represented in an awkward and ludicrous light, posture, and condition, and that the plaintiff was alleged as speaking certain words. Held, after verdict, that the declaration was sufficiently certain as to a libel on the plaintiff individually, as to the posture and condition of the figures, and as to the words written.

*Ellis v. Kimball*, 16 Pick. 122.

In an action on the case, the introduction of material allegations with a "whereas" is not liable to an objection, as it is in trespass.

*Houghton v. Davenport*, 23 Pick. 235; *Coffin v. Coffin*, 2 Mass. 358.

In debt on an award, a plea that the arbitrators allowed some claims not included in the submission, and disallowed just claims which were submitted, and allowed some twice, should specify such claims.

*Bean v. Farnam*, 6 Pick. 269.

In an action for an injury sustained in the breaking down of a stage-coach, a declaration that the defendants "so carelessly and negligently provided, fitted out, managed and conducted their stage-coach, that while they were driving and conducting the same, it broke down," is sufficiently certain.

*Ware v. Gay*, 11 Pick. 106.

In an action of trespass *quare clausum fregit* against a lessee, when he justifies under his lessor, who, as executor, had entered to foreclose a mortgage, it is not requisite to state in what capacity the lessor holds.

*Howe v. Lewis*, 14 Pick. 329.

In an action for taking extortionate fees for the service of an execution,

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a declaration setting forth only the parties to and the date of the execution, is sufficiently certain after verdict.

*Livermore v. Boswell*, 4 Mass. 437.

Where a declaration contained an allegation that a teller had received money to be accounted for, &c., and for which he had not accounted, it was held a sufficient assignment of a breach of a bond for the faithful performance of the duties of teller.

*American Bank v. Adams*, 12 Pick. 203.

To an action on a bond conditioned for the faithful distribution of the proceeds of certain property among the obligors and certain other creditors of the obligee, a plea that "the other creditors, if any, have not exhibited and proved their claims," is bad for uncertainty.

*Bean v. Farnam*, 6 Pick. 497.*g*

2. Where the Plaintiff must show that he hath performed what was requisite on his Part: ¶And herein, of Conditions precedent, and dependent, and independent Covenants.¶

1. It is laid down as a general rule, that in all cases where an interest or estate commences upon condition, be the condition or act to be performed by the plaintiff, defendant, or any other, and be it in the affirmative or negative, there the plaintiff ought to show it in his declaration, and aver the performance of it; for the interest or estate commences in him upon the performance of the condition, and not before. But when the interest or the estate passes presently, and vests in the grantee, and is to be defeated by matter *ex post facto*, or condition subsequent to be performed in the affirmative or negative, or to be performed by the defendant or any other; there the plaintiff may count generally without showing any performance; and this shall be pleaded by him who is to take advantage of it.

7 Co. 10; Lil. Reg. 418; *β*Gray v. James, Pet. C. C. 482; *Zerger v. Sailer*, 6 Binn. 24; *Whital v. Morse*, 5 S. & R. 358; *Thomas v. Hodgson*, 5 Whart. 493; *Grace v. Regal*, 11 S. & R. 351; *Webster v. Warren*, 2 Wash. C. C. R. 456.*g*

¶There are not any precise technical words necessary to constitute a condition precedent, or a dependent or independent covenant. Whether a condition be precedent or subsequent, or a covenant dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties as far as can be collected from the instrument; and however transposed the covenants may be, their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence that an action cannot be maintained unless performance, or that which the law considers as equivalent to performance, be averred and proved.

*Per* Lord Mansfield, in *Kingston v. Preston*, Doug. 690; and see *Willes' R.* 496; 3 Term R. 371.

If an annuity of 10*l.* *per annum* be granted to a man when he shall be promoted to a benefice, in his demand of it he must show that he is promoted; but if it be granted until he be promoted there, he shall have a writ of annuity, and he need not say that he is not yet promoted, because the annuity precedes, and the promotion is subsequent.

Co. 10, Doct. pl. 85.

## (B) The Declaration.

||In an action by lessor on a covenant by defendant to repair, "the lessor finding timber, &c.," it is necessary in the declaration to aver that the lessor found timber; for it is a condition precedent to the defendant's covenant.

*Thomas v. Cadwallader*, Willes' R. 496.  $\beta$  When several things are to be done by the plaintiff, before the performance of the defendant's part of the agreement, the plaintiff must aver the performance of all that was to be done by him. But if the performance of part be not averred, and by the defendant's plea, or notice under that plea, it appears that the part in question was performed, the declaration is cured. *Zenger v. Sailer*, 6 Binn. 24. $\gamma$

So where the declaration stated that by articles of agreement the plaintiff covenanted that he would, on or before 1st August, 1797, convey to defendant a school-house, and would, on or before the 24th June, 1796, surrender up the premises to defendant, and deliver over, as far as he could, all the pupils, &c.; and in consideration thereof the defendant covenanted to pay the plaintiff, on or before the 1st August, 1797, a sum of money, and then averred that plaintiff surrendered up the premises, &c., but did not aver that he made any conveyance, the court on demurrer gave judgment for the defendant on the ground that the conveyance was the consideration of the defendant's covenant, and that it was necessary to aver that a conveyance was made, or at least tendered.

*Glazebrook v. Woodrow*, 8 Term R. 366. Vide *Heard v. Wadham*, 1 East, 619.

So where the plaintiff declared on a policy against fire, by which it was stipulated that the assured sustaining loss should procure a certificate from the minister, churchwardens, &c., that they believed the loss to be without fraud, it was held that the procuring this certificate was a condition precedent to the plaintiff's claim, and that he could not recover without averring that it was procured; and it made no difference that the minister, churchwardens, &c., refused to sign it.

*Worsley v. Wood*, 6 Term R. 710.

So where in a charter-party, the defendant, the freighter, covenanted that if the ship should be taken, and it should appear to a court-martial that the master and company had made the best defence they were able, the value of the ship should be paid by defendant, it was held a condition precedent that it should appear to a court-martial, &c., and the plaintiff was bound to show that it had appeared, &c., or that it arose from the fault of the defendant that it had not.

*Davis v. Mure*, 1 Term R. 642.

So where the plaintiff had let his ship by charter-party to the defendant to freight from Liverpool to W, and back to Liverpool, in consideration of which the defendant agreed to pay freight at so much per hundred for deals delivered at Liverpool, it was held that the delivery at Liverpool was a condition precedent to the plaintiff's right to freight, and that the plaintiff was bound to aver and prove it; and consequently the vessel having been wrecked before her arrival at Liverpool, and obliged to unload the deals elsewhere, the plaintiff could not recover on the charter-party; and this notwithstanding the defendant had accepted the deals so unladen.

*Cook v. Jennings*, 7 Term R. 381. Vide *Smith v. Wilson*, 8 East, 437; *Storer v. Gordon*, 3 Maul. & S. 308; *Gibson v. Mendez*, 2 Barn. & A. 17.

$\beta$  Where the condition of the assignment was, that the plaintiff should "take the necessary legal steps to enforce payment" by the obligor, a general averment is insufficient: he should set out specially what steps he took.

*Ridgway v. Forsyth*, 2 Halst. 98. $\gamma$

(B) The Declaration. (*Performance of Conditions precedent.*)

2. And where the agreement is by *deed* the plaintiff cannot excuse himself from performance of a condition precedent by showing a parol dispensation, or a substitution of some other act by the defendant; for an obligation by deed cannot be altered but by deed. Therefore, where the plaintiff covenanted by charter-party to sail with his ship from London to Gibraltar, and there, or at certain other places, to take in a homeward cargo, and return and deliver the same at the port of London, and the agent of the defendant at Cadiz directed by *parol* that the plaintiff should deliver the homeward cargo at Liverpool instead of London, and the plaintiff did so—it was held, that he could not recover freight in an action on the charter-party, since he could not show a performance according to the deed; and the substitution by parol of Liverpool for London could not do away with the covenant in the deed.

Thomson v. Brown, 1 Moo. 358; and vide 11 East, 583; 3 Term R. 592.

3. If the plaintiff shows a *substantial* performance of the condition on his part, it is sufficient. As where the plaintiff declared on an agreement by which the defendant agreed “to pay the plaintiff 5*l.* if he would procure him a tenant for defendant’s house, and get him 350*l.* for the lease.” The plaintiff procured one S, who offered to take the house at 350*l.*, and an agreement was signed between S, and defendant, and 50*l.* was paid as a deposit, but S was unable to complete his contract, and defendant consented to release him, detaining the 50*l.* as a forfeit; it was held that this was a sufficient *substantial* performance of the condition, on the part of the plaintiff, to entitle him to recover the 5*l.*

Horford v. Wilson, 1 Taunt. 12. § The allegation of an offer of performance of a contract, in general terms, with an averment that the defendant did not attend at the time and place, and refused to perform the agreement on his part, is sufficient. Miller v. Drake, 1 Cain. R. 45.

4. If by the same deed each party is to do something advantageous to the other, and on such deed there is not a mutual remedy, the plaintiff in his declaration must aver, that he hath performed what was to have been done by him.

Saund. 319, 320.

§ As where the plaintiff declared that the defendant agreed by *deed-poll* that he would accept S. S. stock of the plaintiff as soon as the receipts should be delivered out by the company, and would pay for the same on the 5th of November next after the date of the writing, and then averred that the defendant did not pay for them at the day. On demurrer, the declaration was held bad for not averring an assignment of the stock or a tender of it; for the intent of the parties appeared to be that one should have the money, and the other the stock; and this was not a covenant entered into by both parties upon which each would have his mutual remedy, but a *deed-poll* of defendant only; and therefore, though on delivery or tender of the stock the plaintiff would have his remedy for the money, yet the defendant on payment of the money would not have any remedy to compel the delivery of the stock.

Lock v. Wright, Stra. 569. §

5. [So where two acts are to be done at the same time, neither party can maintain an action, without showing a performance, or an offer to perform on his part; for where the performance of the plaintiff is prevented by the neglect or default of the defendant, that is equal to a performance.

Kingston v. Preston, Dougl. 688, n.; Jones v. Barclay, Dougl. 684; Blackwell v

(B) The Declaration. (*Performance of Conditions precedent.*)

Nash, 1 Stra. 535; Goodiison v. Nunn, 4 Term R. 761; Hotham v. East India Company, 1 Term R. 638, 645;] [Porter v. Shephard, 6 Term R. 665.]

¶Where, however, the act to be done by the plaintiff is the payment of money, as the price of that to be done by the defendant, (as in actions for not delivering purchased goods, &c.,) the plaintiff is bound to aver a readiness and willingness to pay, but he need not aver a tender and refusal, for a tender and refusal being in all cases equivalent to performance, of course need only be averred where a performance is requisite; but a plaintiff is not bound to perform his part by paying the price till the defendant has done the act for which it is payable. The averment of readiness, &c., seems to import an ability as well as will, and the plaintiff in proof of it would probably be bound to show that he had the money about him ready to pay.

Morton v. Lamb, 7 Term R. 125; Rawson v. Johnson, 1 East, 203; Levy v. Herbert, 7 Taunt. 314; S. C. 1 Moo. 56; Waterhouse v. Skinner, 2 Bos. & Pul. 447.

But where the plaintiff sues for the price, and the act on his part is the consideration for which the money is payable, there the plaintiff must show a performance, or that which is tantamount to it; for in these cases, although the doing the act by one party, and the paying the price by the other, are according to the terms of the contract to be concurrent, yet it is in the nature of such contracts that the money is not to be paid till the act is performed. Thus, in contracts for the sale of goods, it is not sufficient for the vendor in suing for the price to aver a readiness to deliver, but he must aver a delivery or an offer and refusal which are equivalent to it, although we have seen that the vendee may sue for the non-delivery with an averment merely of readiness to pay the money.

Bristown v. Waddington, 2 New R. 355; Ibid. 233.

So where the defendant agreed to purchase a copyhold estate, and pay the purchase-money on having a good title and a proper surrender, in an action for the purchase-money by the vendor, it was held not sufficient for him to aver a general readiness and offer to make a good title and surrender on payment of the money, but the plaintiff ought to have averred that he had actually made a good title and surrendered the estate to the purchaser, or a tender and refusal, and also to have shown what title he had.

Phillips v. Fielding, 2 H. Black. 123; *sed vide* Martin v. Smith, 6 East, 255; and 1 Moo. 498.

So in an action for not accepting and paying for stock, the plaintiff must show either an actual tender and refusal of the stock, or that which is equivalent to it; viz.: an attendance at the place of transfer until the last moment at which transfers are made, on the day appointed, and a neglect of defendant to attend on notice.

Bordenave v. Gregory, 5 East, 107. Vide Archb. on Plead. 86.

In the above cases it is necessary for the plaintiff to show either a performance, or a tender and refusal, or a readiness to perform. In the following cases it is unnecessary:—

1st. Where a day is named for doing the act of the defendant (whether payment of money, or any other act) which must or may arrive before the act on the plaintiff's part is to be performed. In such case an action may be brought for the money, or for not doing any other act, before performance by plaintiff; for it appears that the defendant relied on his remedy, and did not intend to make the performance by plaintiff a condition precedent.

Ughtred's case, 7 Rep. 10 b; 1 Will. Saunders, 320 a; Terry v. Duntze, 2 H. Black. 389.

(B) The Declaration. (*Independent Covenants.*)

As where a man agrees to serve another in war, and the other agrees to pay him so much money for his service before the war begins, the service is clearly not a condition precedent to the payment of the money, and therefore the party may sue for the money without averring performance of the service.

48 Ed. 3, 2, 3; 7 Rep. 10 b.

So if a man covenant to pay another 500*l.* for teaching him a business, 250*l.* to be paid down, and 250*l.* on the 25th February following, an action may be maintained for the second 250*l.* after the 25th February, without averring that the plaintiff taught the defendant the business.

Campbell v. Jones, 6 Term R. 571.]

[2d. Where mutual covenants go to the whole of the consideration on both sides, they are in that case mutual conditions, and a performance must be averred. But it is otherwise where they go only to a part, and where recompense may be had in damages.

Duke of St. Albans v. Shore, 1 H. Bl. 270; Campbell v. Jones, 6 Term R. 572.]  
 Bean v. Atwater, 4 Conn. 3; Day v. Dox, 9 Wend. 129.]

¶ In other words, where the consideration for the defendant's promise is in its nature divisible, and the plaintiff has performed the *substantial* part of the consideration, the defendant shall not be allowed to defend himself from an action for not performing his agreement, by showing that the plaintiff has not performed some subordinate stipulation on his part; but such stipulation shall be considered an independent covenant, on which the defendant may have his remedy by a separate action.

Thus where the plaintiff had sold to the defendant an estate in Dominica, with the negroes, under the usual covenants for a good title, &c., in consideration of a sum in gross, and a certain annuity which the defendant covenanted to pay, "he, the plaintiff, well and truly performing all and singular the covenants and agreements in the said indenture of sale contained;" and in bar to an action for arrears of the annuity the defendant pleaded that the plaintiff had not a title to bargain, sell, &c., the said plantation and negroes, &c., in manner and form as in the indictment mentioned; the court said it would be strange if such a defence were allowed, when, if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity. And Lawrence, J., observing on the case said, that the judgment of the court went on the ground that the plea did not necessarily go to the whole of the consideration, but if the plea had been that the plaintiff had not any title to the *plantation*, he did not know that it would not have been held sufficient; and Le Blanc, J., said—The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity to say that the plaintiff had not a good title in some of the negroes which were on the plantation, because all the *material part of the covenant had been performed*, and the defendant had a remedy upon the covenant for any special damage sustained by the non-performance of the rest.

Boone v. Eyre, 8 Term R. 373; 1 H. Black. 273.

So also, where the master and freighter of a vessel of 500 tons burden, mutually agreed that the ship being every way fitted for the voyage, should proceed to Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver

(B) The Declaration. (*Independent Covenants.*)

the same on being paid freight at so much *per ton*; it was held that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rate *per ton*, the freighter having his remedy in damages for the short delivery. And Lord Ellenborough said—That all the cases of conditions precedent had been where the thing to be done was a strict *indivisible* condition, but that here the condition was *divisible*.

Ritchie v. Atkinson, 10 East, 295; and vide Havelock v. Geddes, 10 East, 555; Davidson v. Gwynne, 12 East, 389; 1 Saund. 320 c.; Archb. on Pleading, 88.]

3d. Where there are reciprocal covenants, on which each party may bring his action, it is held, that in assigning a breach the plaintiff need not show a performance on his part; and on this reason, that each hath a remedy, it is held, that reciprocal covenants cannot be pleaded one in bar of another.

2 Mod. 309; 5 Co. 10; Cro. Ja. 645; 2 Lev. 41; Show. 391; Comb. 265. Vide *tit. Covenant*.

Thus, a writing was drawn in these words: *It is agreed that A shall pay to B 770l. for his land and house, &c., the money to be paid before Midsummer; in witness, &c.* It was sealed by both parties: the money not being paid at the day, B, without making or tendering any conveyance of his land, brings an action of debt upon the bill; and resolved, that it was well brought; and in this case it was said, that A might have an action of covenant against B for not conveying the land.

Sand. 319; Portage v. Cole, 2 Lev. 74; Sid. 423; Raym. 183; 2 Keb. 542, S. C.; [Trench v. Trewin, 1 Ld. Raym. 125, S. P.]

J S brought an *assumpsit* against J D, declaring, that in consideration J S promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50s. Adjudged, that the plaintiff need not aver the delivery of the cow, because it was (a) promise for promise.

Hob. 88; Nicholls v. Rainbred, and Hob. 106, S. P. That where there are mutual promises, the plaintiff need not aver a performance on his part. Yelv. 134; Mod. 62; Roll. R. 336; Vent. 41; Hard. 102; March, 75; Cro. Eliz. 703; Lev. 20, 293; Cro. Eliz. 137; Leon. 186. (a) That both promises ought to be made at the same time, otherwise they will be *nuda pacta*. Hob. 88; Cro. Eliz. 137; Leon. 186.

[If the plaintiff declares, that in consideration he had agreed to deliver cloth to the defendant, the defendant agreed to pay him so much in case A's horse beat B's, which he avers he did, he need not aver the delivery of the cloth. *Secus*, if it were in consideration that plaintiff would deliver cloth, defendant would pay; for in that case the delivery must be averred.

Martindale v. Fisher, 1 Wils. 88.

In *assumpsit* on an agreement to forfeit a deposit of five guineas, and also to pay another sum of 10l. if the defendant did not accept possession of certain premises from the plaintiff, and also pay for certain fixtures therein, at a fair appraisement by two appraisers; it was adjudged on a special demurrer, that the declaration was ill, because the plaintiff had not shown his right to the premises, so that he could have delivered possession according to the agreement. As each was to name an appraiser, he ought also to have shown that he had done so.

Luxton v. Robinson, Dougl. 620.]

In debt on an obligation for payment of money, so soon as several bills of costs are settled, it ought to appear by the declaration that the bills were settled, or that there was some default in the defendant by which means they could not.

2 Saund. 107.



(B) The Declaration. (*Independent Covenants.*) -

{A lessee covenants to repair, "the lessor allowing and assigning timber for the repairs;" this is a condition precedent; and in covenant against the lessee for not repairing, it is necessary to aver that the lessor did allow and assign timber, &c.

Willes, 496, *Thomas v. Cadwallader*.

In an action for the non-delivery of goods, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was *ready* and willing to receive the goods and *to pay* for them according to the terms of the sale, but that the defendant refused to deliver them, without averring an actual tender of the price.

1 East, 203, *Rawson v. Johnson*; 2 Bos. & Pul. 447, *Waterhouse v. Skinner*; 6 East, 555, *Martin v. Smith*; 1 Cain. 45, *Miller v. Drake*, L. P.}

¶In covenant, a declaration which avers that the plaintiff had performed as nearly as was possible, without adding what was done or accepted as a full performance, is bad.

*Stagg v. Munro*, 8 Wend. 399.

When a party is bound by contract to give security for the performance of covenants, this is a condition precedent, which must be complied with before bringing the action; and an averment by the plaintiff, that he was ready to give such security, but that it was not required of him, is not enough.

*McIntire v. Clark*, 7 Wend. 330.

When a party entered into an agreement to give a contract for a certain lot of land at four dollars per acre, and no time was specified when the contract was to be delivered, nor when or what manner the consideration was to be paid or secured, and when the quantity of acres in the lot was not mentioned in the agreement; in an action for the non-delivery of the contract, it was held that the plaintiff must supply the deficiencies in the agreement by proper averments in his declaration.

*Osborn v. Lawrence*, 9 Wend. 135.

In declaring for a fraud on representing a machine, on sale of the patent right, as capable, if constructed and worked as described by the defendant, of performing a certain quantity of labour, and averring that so constructed it would not perform the work; held that it is unnecessary to set forth the manner of construction.

*Corwin v. Davison*, 9 Cowen, 22.

In an action on a promise to indemnify against a recovery of moneys, it is not sufficient to aver in the declaration, in general terms, that the plaintiffs were compelled to pay.

*Packard v. Hill*, 7 Cowen, 434.

An averment in a declaration that the plaintiff attended at the time and place appointed, ready prepared, and offered to execute a conveyance according to the said agreement, and that the defendant did not attend, and that he has refused to accept the same, and perform the agreement on his part, is a sufficient averment of an offer to perform.

*Miller v. Drake*, 1 Cain. R. 45.

## (B) The Declaration.

In a declaration upon a bond with collateral condition, the condition must be set out, or no judgment, even by default, can be given.

Dorsey v. Biddle, 2 Bibb, 312.g

3. Where general Allegations in the Declaration are sufficient; and therein, of *Miscellaneous*, Omissions, ¶ and Variances.¶

Although the plaintiff must set forth in his declaration every material thing, without which he could not be entitled to his action, yet herein the law requires no greater certainty than the nature of the thing is capable of, and therefore, if a contract be made in general terms, the declaration upon such contract may be in the same terms: as, if the plaintiff declare, that whereas the defendant was possessed of the sixth part of a ship, and it was agreed the defendant should by writing sell his interest to the plaintiff for 600*l.*, and that the plaintiff should pay 20*l.* in hand, and the residue *super executionem* of the said writing; and that in consideration the plaintiff had paid the 20*l.*, and assumed to perform the agreement on his part, the defendant did assume to perform it on his part; *præd. tamen* the defendant had not performed the agreement on his part: this being on a mutual promise, the breach is well assigned in the words of the promise.

3 Lev. 319, Keesch v. Knight. § Every material fact, which constitutes the ground of the plaintiff's action, must be alleged in his declaration. Drowne v. Stimpson, 2 Mass. 441.g

So if in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessaries as he should want, the defendant assumed and promised to pay, &c., and avers, that he found him necessaries amounting to such a sum, &c.; this is a good declaration, without showing in particular what those necessaries were, being in the words of the contract; and the adding the particulars would make the record too prolix.

3 Bulst. 31, Crips v. Bainton; Roll. R. 173, S. C.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, &c., who pleaded *infra ætatem viginti et unius annorum*; the plaintiff replied, it was for necessaries generally; and upon demurrer to his replication it was objected, that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good.

Carth. 110, 111, Huggins v. Wiseman; 3 Lev. 170, S. P.; 3 Mod. 69, 70, and vide Cro. Ja. 486, *cont.*

In debt upon an obligation, conditioned to satisfy for all goods that an apprentice shall waste; in his replication the plaintiff assigned for breach, that he had wasted *diversa bona ad valentiam* 100*l.* And adjudged upon demurrer that it was good, without showing what the goods were, for the penalty of the obligation is to be recovered upon any breach; but *per cur.*, It would be otherwise in (a) covenant where there is to be a recompense for the damages.

Lev. 94, French v. Pierce. (a) In an action of covenant several breaches may be assigned; otherwise, in debt upon an obligation conditioned to perform covenants. Cro. Car. 176; and vide title *Covenant*, and the statute 8 & 9 W. 3, c. 10, whereby it is enacted, that in actions on bonds for non-performance of covenants, plaintiffs may assign as many breaches as they think fit.

In an action of covenant, the agreement was to pay rents at several days during the term; plaintiff assigns breach, that he did not pay the several

## (B) The Declaration.

rents at the several days during the term; this was urged to be double, uncertain, and naught: but the court held, that in covenant the plaintiff may assign the breach as general as the covenant, though it includes twenty matters; and that here it might be intended that no one rent was paid upon any one day during the term.

Lev. 78; Keb. 371, 468, 490, *Conyers v. Smith*.

In covenant by a master against his servant, on a covenant not to buy or sell without the master's leave within two years; the breach assigned was, that he had *diversis diebus et vicibus*, between such a day and such a day, sold to H and to several other persons unknown, goods to the value of 100*l*. After verdict for the plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to the time and persons; but the court held it certain enough, and that in covenant it is sufficient to assign a general breach.

Salk. 139, pl. 5; Ld. Raym. 478, *Farrow v. Chevalier*.

If a breach of covenant is sufficiently alleged, the plaintiff need not conclude *et sic non tenuit conventionem in hac, &c.*, for that is but repetition.

Cro. Ja. 298. *β* The breach in a declaration need not be broader than the words of the covenant. Talbot v. Bedford's heirs, Cooke's R. 477, 459*g*.

If A leases to B for years, and covenants that he hath full power and lawful authority to lease, &c., and in an action upon this covenant B says, he had (a) not full power and lawful authority to lease, &c., the breach is well assigned, for he hath well pursued the words of the covenant *negative*; and what estate he had lies more in the notice of the lessor than of the lessee; and therefore he ought to show what estate he had at the time of making the lease, that it may appear that he had full power.

9 Co. 60, between Bradshaw v. Salmon; Cro. Ja. 304, S. C. adjudged; and that the defendant must show that he was seised in fee, and then the plaintiff must show a special title in somebody else; but the covenant being general, the general assignment of a breach *prima facie* is good. (a) That he was not lawfully seised in fee of an indefeasible estate. Cro. Ja. 369; Raym. 14, 15.

If A covenants to permit B, his heirs and assigns, to take and enjoy the rents, issues and profits of certain lands, and in an action upon this covenant the plaintiff assigns for breach, that A took the profits, *et (b) non permisit* B to enjoy, &c. This breach is well assigned: for the taking the profits by A is a special disturbance.

Jon. 218, Symons v. Smith; Cro. Car. 176, S. C. adjudged; and vide Hard. 132, 133. (b) But *non permisit* only is too general. 8 Co. 89 b, 91 b; and vide And. 137; 2 Vent. 278.

|| Where the plaintiff sues for a mere duty payable on request, it is necessary to aver a request, for in such case the bringing of the action is a sufficient request; but where a collateral sum is promised to be paid on request, then the plaintiff in suing for it must aver a request with time and place; for the request is parcel of the contract, and no action arises until the request is made, and the omission of averring a special request, where by law it is necessary, is matter of substance, and bad on demurrer, and even after verdict; though if the declaration contain the general averment *licet sapius requisitus*, it will be good unless specially demurred to.

Birks v. Trippet, 1 Saund. 33 a; and cases *ibid.* note 2; and see 2 Barn. & C. 682; Bach v. Owen, 5 Term R. 409; Doug. 679.

And where the defendant has, by his own act, put it out of his power to fulfil his agreement, there an averment of request is unnecessary.

Bowdell v. Parsons, 10 East, 359; Amory v. Brodrick, 5 Barn. & A. 712.]

(B) The Declaration. (*Generality and Particularity.*)

[Where the defendant covenanted, that he would not take wood without the assent or assignment of the lessor or his assigns, it was holden not to be sufficient to allege in the declaration that the defendant took wood *without the assignment* of the lessor or his assigns; for it might be with *their assent*, and so no breach.

Sherwood v. Noone, 1 Leon. 250.

But where the covenant was "to pay or cause to be paid," that the defendant had not paid, was holden to be a sufficient assignment of the breach, without adding "or caused to be paid," for if the defendant had caused to be paid he had paid.

Aleberry v. Walby, 1 Stra. 229.] ¶Vide 1 Saund. 235.]

¶But in assigning a breach on a recognisance conditioned that J B and G K should pay, &c., or render themselves, on special demurrer, it was held not sufficient to allege that J B and G K had not paid, &c., or rendered themselves according to the form and effect of the recognisance, without averring that *neither* of them had done so.

Wilkinson v. Thorley, 4 M. & S. 33.]

In assigning a breach of covenant for quiet enjoyment, the plaintiff alleged, that at the time of the demise to him, A B had lawful right and title to the premises, and having such lawful right and title entered, &c., and evicted him, &c., and adjudged sufficient, though he did not show what title A B had, or that he evicted the plaintiff by legal process.

Foster v. Pierson, 4 Term R. 617; ¶1 Term R. 671; Hodgson v. E. I. Company, 8 Term R. 278; 2 Saund. 181 a.]

¶In a declaration on a bill of exchange, a general averment of notice to the defendant of all the premises is sufficient.

Boot v. Franklin, 3 Johns. 207. See Cumming Fisher, Anth. N. P. 5.g

If A grants a rent to B and his heirs for the life of C, to the use of C, and covenants with B to pay the rent *ad opus et usum* of C, and in an action upon this covenant B assigns the breach in not paying the rent to him, *ad opus et usum* of C, this breach is well assigned in the words of the covenant, though a negative pregnant.

Mod. 223, Boscawin v. Cook, adjudged upon a special demurrer; 2 Mod. 138, S. C., adjudged, and said, that if it was paid to C, which is a performance in substance, the defendant ought to have pleaded it; otherwise it shall not be intended. ¶Vide as to negatives pregnant, Com. Dig. *Pleader* (R), 5, 6; Archb. on Plead. 35, 190.]

¶[No inconvenience can arise from assigning a breach as largely as the contract, for the plaintiff may recover *pro tanto*, though he only prove a part of the breach as laid.

Barnard v. Duthy, 5 Taunt. 27; Forty v. Timber, 6 East, 434. ¶Declaration on a covenant to pay four thousand four hundred dollars; breach that the defendant has not paid four thousand dollars: Held to be a good breach. Dale v. Roosevelt, 9 Cowen, 307.g

And on the other hand the plaintiff may be prejudiced by *narrowing* the breach unnecessarily. As where a breach was assigned on a covenant to use premises in a husbandlike manner, that the defendant did not use the premises in a husbandlike manner, but on the contrary committed waste; it was held that the plaintiff could not show in evidence any breaches of good husbandry not amounting to waste; although had he assigned a breach merely in the words of the covenant, such evidence would have been admissible.

Harris v. Mantle, 3 Term R. 307.]

(B) The Declaration. (*Generality and Particularity.*)

In trover for a bond the plaintiff need not show the date; for the bond being lost or converted, he may not know the date; and if he should mistake it, it would be a failure of his suit.

Cro. Car. 262, *Wilson v. Chambers*, adjudged, after a verdict for the plaintiff, and affirmed upon a writ of error. Cro. Ja. 638, S. P. adjudged upon demurrer; Hard. 111. Like point in trover for letters patent. Brown Ent. 356, a like precedent. Vide Ent. 265, a like precedent.

§ In a declaration on *assumpsit* that the plaintiff would forbear to sue another, it is sufficient to state that the other was indebted, without averring that the debt was then due.

*Johnes v. Potter*, 5 S. & R. 519.

Plaintiff declared that the defendant, in consideration that the plaintiff, at his special instance and request, would become bound to A by his obligation conditioned for the payment of one thousand dollars, assumed upon himself and promised the plaintiff to indemnify him for all loss by the said obligation; held good, without setting forth on what account the obligation was given.

*Bull v. Allen*, 11 S. & R. 52.g

If in action upon the case against a lighterman, the plaintiff declares the defendant so negligently governed his lighter, that it took water, and spoiled the goods of the plaintiff *ad damnum*, &c., the declaration is good, without a more special allegation how they were spoiled.

*Palm. 532, Symons v. Darknell.*

So it hath been held, that a declaration against a lighterman is good, though not alleged in the declaration that he is a common lighterman; as also against a carrier, without alleging that he is a common carrier.

*Palm. 523; Sid. 245, S. P.*, yet said to be the best way to recite it.

A statute which does not give the action, but is only in affirmance of the common law, need not be recited; as on the statute of Marlbridge (52 H. 3) the plaintiff may declare, that his father was seised in fee of certain lands, and died seised; and that the lands descended to him; and the defendant had occupied them as guardian in socage, without any recital of the statute.

§ Whenever double or treble damages are given by a statute, such demand must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff and against the form of the statute. *Rees v. Emerick*, 9 S. & R. 288; *Morrison v. Gross*, 1 P. A. Bro. 9.g

[If a plaintiff in his declaration undertake to recite a statute, which statute is the ground of his action, and he misrecite it, as by stating it to be made in the 4th of Ph. & M. instead of the 4th and 5th, the variance is fatal.

*Rann v. Green*, Cowp. 472; ¶ and vide 6 Term R. 771. ¶ § When the declaration set forth a judgment as of October term, 1813, *prout palet per recordum*; on *nul tiel record*, the judgment produced was of October term, 1814: held, a fatal variance. *Vail v. Smith*, 1 Cowen, 71.g

In an action of covenant it is not only unnecessary, but likewise improper, to set forth the whole of the deed. So much only as is necessary to entitle the plaintiff to his action ought to be shown; nor need that part be recited literally, but may be set forth according to its substance and effect; though it is usual and advisable to deviate as little as may be from the expressions in the instrument.

*Dougl. 667; Cowp. 665, 727.]*

{It is no more necessary to state every part of an agreement not under

(B) The Declaration. (*Generality and Particularity.*)

seal, each part making a distinct contract, than it is of an agreement under seal; but it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act which is to be done for such consideration. The parts of the contract which respect only the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury in reduction of damages, but not necessary to be shown to the court on the face of the record.

6 East, 564, *Clarke v. Gray*.

And where the whole consideration of the contract is truly set forth, and also all those parts of the contract itself, the breach of which is complained of, it is not necessary to set forth other parts of the contract which do not qualify or vary the former in any respect.

8 East, 7, *Miles v. Sheward*; 1 Bos. & Pul. 7, *Baptiste v. Cobbold*.

The declaration stated that in consideration that the plaintiff had sold to the defendant *a certain horse* of the plaintiff, at and for *a certain quantity of certain oil*, to be delivered within *a certain time*, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly. After a verdict for the plaintiff, the court at first directed the judgment to be arrested, as the declaration left it wholly uncertain what the special contract was. But after considering further of their opinion, three of the judges thought that the objection could not prevail after verdict; and Lord Eldon, C. J., yielded to their authority.

2 Bos. & Pul. 265, *Ward v. Harris*.}

||Every instrument, whether a statute, record, deed, bill of exchange, or any other writing, which the plaintiff undertakes to state, must be stated truly, either according to the language, or the legal effect; for a variance between the statement and the evidence is fatal as a ground of nonsuit.

¶ *Vide Slocum v. Slocum*, 8 Watts, 367; *Hendell v. Berks and Dauphin Turnpike Co.*, 16 S. & R. 92; *Bemus v. Howard*, 3 Watts, 255; *Howell v. McCoy*, 3 Rawle, 256; *Taylor v. Morgan*, 3 Watts, 333; *Lee v. Conard*, 1 Whart. 155; *Church v. Feterow*, 2 Penna. R. 301; *Wilson v. Irwin*, 14 S. & R. 176; *Stephens v. Graham*, 7 S. & R. 405; *Dunbar v. Jumper*, 2 Yeates, 74; *Musgrave, qui tam, v. Gibbs*, 1 Dall. 216; *Evert, qui tam, v. Barr*, 4 Yeates, 99; *Dillman v. Schultz*, 5 S. & R. 35.g

Thus, if a declaration state a judgment to be against one defendant only, when it is against more than one, or of a term different from that which appears on record, the variance is fatal.

*Rastall v. Stratton*, 1 H. Bl. 49; *Readshaw v. Sheriff of Middlesex*, 4 Taunt. 13; *¶ Vail v. Smith*, 1 Cowen, 71.g

So an allegation that the plaintiffs "by the judgment of the court recovered against bail," is not proved by production of the recognisance of bail, and the *scire facias* roll with the award "that the plaintiffs have their execution," &c., for that is not a judgment to recover.

*Philipson v. Mangles*, 11 East, 516. *Vide Archb. on Plead.* 116.

¶ A variance between the writ and declaration can be taken advantage of only by obtainingoyer of the writ, and pleading the variance in abatement.

*Slocum v. Slocum*, 8 Watts, 367; *Springer v. Commonwealth*, 3 Penns. 28. See *Jennings v. Cox*, 1 Binn. 588, in note.

Evidence that the defendant sent treasury notes by mail, does not support an allegation in his plea that he sent cash.

*Foquet v. Headley*, 3 Conn. 534.

(B) The Declaration. (*Variances.*)

A declaration on a judgment against A S, and D G, where the plea of *nil tiel record* is entered, is not supported by a judgment against A S, and D G *junior*.

Dekentland v. Somers, 2 Root, 437.

The plaintiff declared against the defendants, that by a certain writing under their hands, &c., they promised to pay, and the evidence was a note signed for the defendants by their attorney; held, that this was not a variance.

Philips v. Riley, 3 Conn. 266.

When a count upon a promissory note does not state when the note was payable, a note payable sixty days after date cannot be given in evidence to support the count upon the note; the variance is fatal.

Sheeky v. Mandeville, 7 Cranch, 208.

To support a count on a note describing it as payable on demand, a note payable at a certain day after date cannot be given in evidence

Page's Admr. v. The Bank of Alexandria, 7 Wheat. 35.

When the pleadings purport to recite a deed or record, *in hæc verba*, trifling variances have been deemed fatal. The words of a contract stated in the declaration must have the same legal construction as they would have in the contract itself; whenever, therefore, the contract stated in the declaration contains a clause which the court would have rejected as nonsensical or repugnant, or the inaccuracy of which would have been rectified, the mistake is not fatal.

Ferguson v. Harwood, 7 Cranch, 408.

The declaration set forth that an action was brought in which the writ was returnable the first Monday of *December*, 1809, and it appeared by the record produced that the writ was returnable on the first Monday of *March*, 1809, the variance was holden fatal.

Munns v. Dupont, 2 Wash. C. C. R. 468. See Vail v. Smith, 4 Cowen, 71; Brooks v. Bemiss, 8 Johns. 455.

An indictment for perjury charged the offence to have been committed at the circuit court, held the *19th day of May*, and the record showed that the court was held the *20th day of May*; the variance was fatal.

United States v. McNeal, 1 Gallis, C. C. R. 387.

An indictment alleged the purport of a paper to be that a certain vessel was of the burden of fourteen tons and *forty-five* ninety-fifths of a ton; the paper produced, stated it to be of fourteen tons and *fifty* ninety-fifths of a ton; the variance was holden fatal.

United States v. Lakeman, 2 Mason, 229.

Where there is only a variance of a letter in any word between alleged to be forged and an indictment for forgery, the paper will be received in evidence, if the variance does not make another word, or one differing in sense or grammar. When it is doubtful, it will be left to the jury.

United States v. Hinman, 1 Bald. 292.

When a proceeding is according to the form of the civil law, the strict rules which prevail in courts of common law are seldom applicable. The court will not permit a party to be surprised by the production of *probata* materially variant from the *allegata*, but allow the libels or pleadings to be

(B) The Declaration. (*Variances.*)

amended. When the variance would not mislead, the court will proceed to a decree.

Crawford v. The William Penn, 3 Wash. C. C. R. 484.

In an action on a promissory note, expressed on its face to be "for value received," if the declaration omit so to state it, the variance will be fatal.

Rossiter v. Marsh, 4 Conn. 196.

In *assumpsit* it is in general sufficient for the plaintiff to state only those parts of the contract, for the breach of which he seeks to recover; yet the whole consideration must be explicitly and correctly stated; for if any part of an entire consideration be omitted or misrepresented, the variance will be fatal.

Curley v. Dean, 4 Conn. 359.

When the plaintiff declares on a special agreement, he must prove that agreement as stated in his declaration, and variance will be fatal.

Burnell v. Taintor's admr., 5 Conn. 273. See Hughes v. Burney, 2 Conn. 704; Rossiter v. Marsh, 4 Conn. 196; Russell v. South Britain Society, 9 Conn. 508; Hendrick v. Seely, 6 Conn. 176; Curley v. Dean, 4 Conn. 359; Wells v. Abernethy, 5 Conn. 222; Watson v. Osbourn, 8 Conn. 363; Shepard v. Palmer, 6 Conn. 95.

In an action *qui tam* for usury, the plaintiff alleged a loan by the defendant to A, for *sixty-three* days, and produced a note in evidence executed by A and B jointly and severally, payable to the defendant in *sixty* days; held, to be a fatal variance.

Wilmot v. Monson, 4 Day, 114.

In their declaration, the plaintiffs set forth an exchange of vessels between themselves and the defendants, and that the defendants agreed to pay \$6500 as the difference. The plaintiffs proved that the agreement was to pay in notes at four, six, and eight months; this, it seems, is no variance, the suit having been brought after all the notes fell due.

Porter v. Talcott, 1 Cowen, 359.

There is no variance in declaring on a note bearing date 4 *mo.* 1st, as having been made on the 1st of *April*.

Field v. Field, 9 Wend. 394.

The libellous matter set forth in a declaration on the case for a libel contained the words *U. States*, and in the paper produced in evidence it was written *United States*, the variance was held to be immaterial.

Lewis v. Few, 5 Johns. 1.

In an action for an escape, the plaintiff stated the substance of the execution in his declaration, without setting it out *in hæc verba*; in the execution produced there was a difference of one cent between the amount stated in the declaration and the execution in the damages and costs; held that the variance was immaterial.

Bissel v. Kipp, 5 Johns. 89.

Debt on recognisance of bail, the declaration laid the venue in Green county, and stated that S F came into the Supreme Court, and "by the name of S F of K in said county," farmer, became bail, &c. The bailpiece offered in evidence was as follows: "Delaware, ss. J H is delivered to bail to S F, of the town of K, in the said county, farmer," &c. It was taken before a judge of Delaware Common Pleas; and the recognisance roll



(B) The Declaration. (*Variances.*)

stated that "S F of the town of K and county of D, farmer," came into court and became bail, &c. Held, that there was no material variance between the declaration and the bail-piece and recognisance roll, the description in the declaration being set out according to the sense and not according to the tenor.

Rodman v. Forman, 8 Johns. 96.

A contract must be proved as laid in the declaration; the plaintiff cannot therefore give in evidence an entire contract relative to two distinct subjects when he declares only as to one of them; for example, when the contract declared upon was that the defendant should pay for one half of a tract of land, and the proof was that he should pay for all the land, the variance was held to be fatal.

Crawford v. Morrell, 8 Johns. 253.

Where a contract stated in the declaration is on a past consideration for the delivery of goods, without mentioning the place of delivery, and in the alternative as to the time and the contract proved was an executory consideration to deliver goods at a time and place mentioned; the variance was held fatal, and the verdict was set aside.

Robertson v. Lynch, 18 Johns. 451.

A variance in a contract set forth in a plea, and that given in evidence, is as fatal as in a declaration.

Lawrence v. Kneis, 10 Johns. 140.

In case against the sheriff for a false return, the declaration being dated in the reign of the queen, alleged the judgment in the reign of the late king, as appeared by the record "still remaining in the said court of our said lord the late king;" held, that there being such record, there was no variance.

Lewis v. Alcock, 6 Dowl. 78; 3 Mees. & W. 188.

A declaration in which the note on which the suit is brought is described as dated on the 25th of July, is not supported by proof of a note bearing date the 26th of July.

Stephens v. Graham, 7 S. & R. 405.

But when the time of doing a thing is *immaterial*, evidence of a different is admissible.

Jordan v. Cooper, 3 S. & R. 576.

It is not a variance to allege that a draft or an endorsement which has no place nor time of date was made at a particular place or time.

Fairfield v. Adams, 16 Pick. 381.

The payee of a note payable to himself or his order declared on it as payable to himself; held an immaterial variance.

Fay v. Goulding, 10 Pick. 122.

In an action for taking extortionate fees, the declaration alleged that they were paid by A; but the evidence was that B paid them, as agent of A's father, A being a minor; held, a variance.

Lincoln v. Shaw, 17 Mass. 410.

A declaration for carelessly and negligently providing, fitting out, managing, and conducting a stage-coach, is supported by proof that the wheel came off in consequence of the unfitness of the nut to secure it on.

Ware v. Gay, 11 Pick. 106. See as to variances Worster v. Canal Bridge, 16 Pick. 541; Stedman v. Southbridge, 17 Pick. 102; Cunningham v. Kimball, 7 Mass. 65.

(B) The Declaration. (*Variances.*)

Colt v. Root, 17 Mass. 329; Hill v. Hoskins, 8 Pick. 83; Dyer v. Stevens, 6 Mass. 389; Dorr v. Fenno, 12 Pick. 521.*g*

But a distinction is established between allegations of substance, and allegations of matters of description; the former may be substantially proved, the latter require to be *literally* proved. Thus where in a declaration for a false return to a *feri facias*, the declaration alleged that the plaintiff in Easter term, 2 Geo. 4, recovered, &c., "as appears by the record," and the proof was of a judgment in Easter term, 3 Geo. 4; it was held that the variance was not fatal, not being in matter of *description*; for the *prout patet*, &c., might be rejected as surplusage, and the judgment was only inducement to the action.

Stoddart v. Palmer, 3 Barn. & C. 2; and see 9 East, 157; 4 Barn. & A. 435; 4 Barn. & C. 403; 2 Barn. & C. 2; Moo. & Malk. 118. *β* On a writ of error, a variance between the instrument in writing produced in evidence on the trial and the description of such instrument in the declaration, cannot be urged in reversal of the judgment, unless specifically pointed out on the trial; a general objection of variance is not sufficient. *Weston's Executors v. McLaren*, 19 Wend. 557. See *Whitney v. Sutton*, 10 Wend. 411; *Lawrence v. Barker*, 5 Wend. 301; *Pike v. Evans*, 15 Johns. 210.*g*

So in an indictment for perjury, in an answer to a bill in Chancery, the bill was said to be exhibited against three persons only, A, B and C, and when it was produced there appeared to be a fourth defendant; this was held no variance, though if the indictment had professed to set forth the title of the bill, it would have been otherwise.

*Rex v. Powell*, Ry. & Moo. Ca. 101; and see *Rex v. Benson*, 2 Campb. 508; and *Ry. & Moo. Ca. 291*.

But where in an action against the sheriff, on the 8 Ann. c. 14, the declaration alleged that the sheriff, by virtue of a *writ of our lord the king, before the king himself*, &c., took the goods, &c., and the writ appeared to have issued from the Common Pleas, the variance was held fatal.

*Sheldon v. Whittaker*, Ry. & Moo. Ca. 266. In a late case where a judgment was stated to be recovered in K. B., and it appeared to be in C. B., Lord Tenterden allowed an amendment at the trial, under 9 G. 4, c. 15. *Briant v. Eicke*, Moo. & Malk. Ca. 360.

However, where in a similar action it was stated that the plaintiff recovered judgment for his damages, &c., for non-performance of certain *promises and undertakings*, and it appeared by the judgment produced, that a *re-mittitur* was entered as to all the counts but one, and the damages were assessed on that count only, this was held fatal.

*Edwards v. Lucas*, 5 Barn. & C. 339.

Where, in an action on a bail-bond, the condition set out was to answer the plaintiff in a plea of trespass, and also to a bill to be exhibited against defendant, for 60*l.* on *promises*, and the bond did not contain the words "*on promises*," the variance was held fatal.

*Baker v. Newbegin*, Ry. & Moo. Ca. 93.

So where the plaintiff stated a covenant in a lease, that the defendant would under-ground-gutter the *Cellar-beer-field*, and on production of the lease the name appeared to be the *Aller-beer-field*, the variance was held fatal.

*Pitt v. Green*, 9 East, 188; and vide 1 Marsh. 355.

So a demise was stated of lands in the *parish* of B and M, and the deed demised lands in the *parishes* of B and M, the variance was fatal.

*Morgan v. Edwards*, 6 Taunt. 394.

(B) The Declaration. (*Variances.*)

So where a demise was stated of a wharf and *storehouses*, and in the deed the word was *storehouse*, the variance was fatal.

*Hoar v. Mill*, 4 Maul. & S. 470; and see *Ry. & Moo. Ca.* 98; and vide 4 Maul. & S. 474, n.; 1 Barn. & A. 57.

But where a covenant was to pay (among other instalments) an instalment within twelve *calendar* months, from, &c., and on the record the word "*calendar*" was omitted, but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word *calendar*, it was held that this was no variance.

*Cockell v. Gray*, 3 Bro. & B. 186; 6 Moo. 483.

Where a bill drawn by *J. Couch* was declared on as a bill drawn by *J. Crouch*, the plaintiff was nonsuited.

*Whitwell v. Bennett*, 3 Bos. & P. 559. ¶ The plaintiff declared by the name of *William T. Robinson*, and gave in evidence a deed to *William Robinson*, the omission of the middle letter was held to be an immaterial variance. *Franklin v. Talmadge*, 5 Johns. 84. See 4 Watts, 329; 14 Pet. 322; 3 Pet. 7; 2 Cowen, 463; Willes, 654; 1 Young, R. 602.g

So where in an action for usury in discounting two bills of exchange, one of which was described as drawn by B, on a certain person, to wit: John K, and the bill appeared to be drawn on Abraham K, the variance was fatal.

*Hutchinson v. Piper*, 4 Taunt. 810; and vide 3 Moo. 79; 1 Camp. 195; 1 Brod. & B. 443; Moo. & Malk. 6; and vide 2 Camp. 305, 306.

¶ In an action upon a promissory note the plaintiff declared that it was made by the defendant by the name of *Christopher Bulkley*, and the note produced in evidence was signed *Christ. Bulkley*. It was proved on the trial that the defendant usually signed his name in this manner; held that there was no variance.

*Wood v. Bulkley*, 13 Johns. 486.

In an action against A W and *Daniel S B*, trading as W & B, the second defendant's name was *Dan*, and not *Daniel*: held that the objection made to the plaintiff's recovery on this ground would not avail the other defendant under the general issue.

*Whittier v. Gould*, 8 Watts, 485.

The declaration recited that *E. Brown* was attached to answer, &c., and then charged *Elisha Brown*, on a bill of exchange, drawn by him in favour of the plaintiff, a bill of exchange signed *E. Brown*, and it was proved that it had been made by *Elijah Brown*; held inadmissible.

*Craig v. Brown*, 1 Pet. C. C. R. 139.

A declaration alleging a promise by the "said John and P," in an action against "Joseph and P," is bad.

*Hemmenway v. Hickes*, 4 Pick. 497.

In a *scire facias* against J B B, as endorser of a writ, a recital that J C B endorsed, &c., is bad.

*M'Gee v. Barber*, 14 Pick. 212.g

The above were variances in *description* of written instruments. But where the plaintiffs sued by name of "The National Bank of St. Charles," and their real name was "The Bank of St. Charles," it was held no variance, the bank being a national one.

*Ry. & Moo. Ca.* 190. ¶ *Charitable Association v. Baldwin*, 1 Metc. 359; *Commercial Bank v. French*, 21 Pick. 486.g

(B) The Declaration. (*Variances.*)

Where the declaration stated that by a certain indenture, it was witnessed, amongst other things, that as well in consideration of the sums expended by the plaintiff in erecting furnaces, &c., the defendant did demise, &c., and on production of the deed the consideration was stated, that as well in consideration of the sums expended by plaintiff in erecting furnaces, &c., as also in erecting dwelling-houses, and in consideration of the yearly rents, reservations, &c., the defendant did demise, it was held a fatal variance.

*Swallow v. Beaumont*, 2 Barn. & A. 765. Vide the cases in Archb. Plead. 114; and vide 6 Term R. 363; *sed* vide 1 Barn. & A. 224; 6 Taunt. 394.

Where the declaration stated that J S, by deed conveyed the purparty of an advowson to A, and by the deed it appeared that J S, conveyed the *whole*, but he possessed only a purparty, this was held no variance.

*Gully v. Bishop of Exeter*, 4 Bing. 390.

Where in *assumpsit* the plaintiff averred that he was entitled to a term of thirty-two years in certain premises, under a contract with A, and that defendant having agreed to take the premises, plaintiff was ready to grant him a lease of thirty-one years, and it appeared that the plaintiff had only twelve years in the premises, and had no written contract with A, for a term of thirty-two years, the variance was held fatal.

*Routledge v. Grant*, 4 Bing. 653.

And where the contract is not in writing the same rule holds, that a variance between the proof and the statement, in any material particular, is fatal.

As where the declaration stated that stock was to be transferred on request, and the evidence appeared to be that it was contracted to be transferred on a certain day, the variance was held fatal.

*Bordenave v. Bartlett*, 5 East, 111; and vide 2 Barn. & A. 335; 13 East, 410. *β* When a previous demand is requisite to support an action, it must be alleged. *Baker v. Fuller*, 21 Pick. 318. See *Ayer v. Ayer*, 16 Pick. 327; *Lawrence v. Carter*, 16 Pick. 12; *Holden v. Eaton*, 7 Pick. 15; *Clark v. Moody*, 17 Mass. 145; *Wait v. Gibbs*, 7 Pick. 146; *Paine v. Moffit*, 11 Pick. 496; *North Bank v. Abbott*, 13 Pick. 465.*g*

So where the declaration stated that the defendant contracted to use the lands in a husbandlike manner, and the contract proved was to farm the land in a husbandlike manner, to be kept constantly in grass, the variance was held fatal.

*Saunderson v. Griffiths*, 5 Barn. & C. 909.

So a contract in the *alternative* cannot be described as an *absolute* contract; as where it was agreed to deliver forty or fifty sacks of wheat on the first market-day; and one count stated it as an absolute contract to deliver forty sacks, and the other count as an absolute contract to deliver fifty, the variance was fatal.

*Penny v. Porter*, 2 East, 2; and vide 2 East, 4, note; 3 Term R. 531; *sed* vide, 6 Taunt. 108. *β* When a contract was made by which the party was to pay different sums for work and labour, accordingly as the labourer should board himself or should be boarded by his employers; he worked at the less sum, being boarded. Held, that in declaring specially upon this contract the plaintiff must state it in the alternative; and that he could not declare and recover upon it as a contract simply to pay the lesser sum. *Hatch v. Adams*, 8 Cowen, 35. See *Guyon v. Lewis*, 7 Wend. 26.*g*

Nor must a qualified contract be stated as unqualified. As where the declaration stated that defendant warranted a horse sound, and the proof was that he warranted the horse sound, except a kick, the variance was fatal.

*Jones v. Cowley*, 4 Barn. & C. 445; and see 2 Barn. & C. 90; 6 Barn. & C. 430; 3 Bing. 472.

(B) The Declaration. (*Variances.*)

In setting out a bill of exchange, or any written instrument, a variance in the *sum of money*, or in the number or quantity of goods, is in general fatal. And so also in parol contracts, where the sum or quantity is not laid under a *videlicet*.

Durston v. Tutham, 3 Term R. 67, n. acc.

As where the declaration stated, that in consideration that the plaintiff would buy forty-five sheep for 54*l.* 11*s.* 6*d.*, the defendant undertook that they were sound; and the plaintiff proved the price to be 54*l.* 12*s.* 6*d.*, the variance was fatal for want of a *videlicet*.

Arnfield v. Bate, 3 Maul. & S. 173.

But where the plaintiffs declared that the defendant agreed to buy certain goods, &c., to wit, three hundred and twenty-eight chests, and thirty half-chests of oranges and lemons, at and for a certain price, to wit, the price of 623*l.* 3*s.*, and the contract proved was for three hundred and eight chests, and thirty half chests of China oranges, and twenty chests of lemons, without specifying price, it was held no material variance, since the quantity, description, and price, were stated under a *videlicet*.

Crispin v. Williamson, 1 Moo. 547; and vide 2 Moo. 114; 1 Barn. & A. 9.

In debt on the statute of Anne to recover penalties for usury, the declaration averred that the defendant afterwards, to wit, on the 3d day of July, 1824, did lend, &c., to T. D., and did forbear and give day of payment for the same to the said T. D., from the lending and advancing thereof, until, &c. The money was proved to have been lent on the 5th July, and this was held a fatal variance by Abbott, C. J., though the day was under a *videlicet*.

Partridge v. Coates, Ry. & Moo. Ca. 153. *β* On a plea of usury, if the evidence vary either in the sum or consideration, from the sum or consideration stated in the plea, the variance will be fatal. Smith v. Brush, 8 Johns. 84.*g*

The general rule as to the use of the *videlicet* appears to be, that although a material and necessary averment or description cannot be rendered immaterial by being laid under a *videlicet*, yet the *videlicet* may save an immaterial averment or description from becoming material, and requiring proof as laid.

Vide, on this subject, 2 Saund. 291 a, n. (1); Archb. on Plead. 97, 118; Ry. & Moo. Ca. 153. *β* See Vail v. Lewis and Livingston, 4 Johns. 450.*g*

With regard to variances as to *place*, we have before seen that a variance in stating the name of a place, which occurs in setting out a deed or written instrument, is fatal, since the name forms part of the instrument, which the plaintiff has undertaken to describe: but where this is not the case, and where locality is immaterial to the question at issue, a variance as to place is immaterial.

4 Taunt. 700. *β* In an action for slander the declaration was entitled "Dauphin county, ss." and stated that the defendant on the 5th of July, 1814, at Cumberland county, to wit, at the county of Dauphin aforesaid, in a certain discourse which he then and there had, of and concerning the plaintiff, and of and concerning the murder of a certain J. S., who before that time was killed and murdered, he, the said defendant, then and there uttered, &c. Held good after verdict. Wills v. Church, 5 S. & R. 190.*g*

Thus in an action on an agreement for not procuring plaintiff a booth at races on Barnet Common, the common was alleged to be in the county of Middlesex, and it appeared that the whole of it was in Herts, the variance was not fatal; for the action was transitory, and the county immaterial, and the variance did not occur in the *statement of the contract*.

Frith v. Grey, 4 Term R. 561, n.; and see Woodward v. Booth, 7 Barn. & C. 301; Ditcham v. Chivis, 4 Bing. 706.

(B) The Declaration. (*Variances.*)

So in *assumpsit* for use and occupation, it is not necessary to state the parish where the premises are situate, and therefore advisable not to do so; but if the parish is described by a wrong name, it is immaterial, provided that it is described by the *name commonly used*, as Chelsea, for St. Luke's Chelsea; Lambeth, for St. Mary, Lambeth.

Kirtland v. Pounsett, 1 Taunt. 570; 3 Taunt. 139; and vide 4 Term R. 558; 1 Bos. & Pul. 225; 3 Maul. & S. 169; 1 Barn. & A. 94, 699; 13 East, 9.

The parish, however, must not be an entirely different one; as St. Mary-le-Bow in the ward of Cheap, instead of St. Bride in the ward of Farringdon Without.

3 Camp. 235; and vide 1 Moo. 161; 4 Barn. & A. 616.

Where a fact is unnecessarily stated to be at a certain place, and the statement is erroneous, if it can be referred to *venue* and not to a local description, the variance will not be fatal; as where the declaration stated that on the 1st of January, 1796, to wit, at Preston, in the county of Lancaster, the plaintiffs were proprietors of the navigation of a river *there* called the Irwell, and there appeared to be no such river at Preston, the variance was held immaterial; for the word "*there*" might be referred to *venue*; and as it was not necessary in an action on the case for diverting the water, to give a local description to the nuisance, it was sufficient to prove it at any place in the county.

Mersey and Irwell Navigation v. Douglas, 2 East, 497; and vide 11 East, 226; 3 Taunt. 791.

In setting out contracts, it is to be observed that a different rule prevails with respect to the *consideration* and to the *promise*; the whole of the former must be stated, and the omission of any part is fatal, since it must appear to the court that the plaintiff has performed every thing to be done on his part; but in stating the defendant's promise, only so much need be set out for the breach of which the plaintiff brings his action. As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse which had been sold by the defendant to the plaintiff, the defendant promised to deliver him another horse, which would be worth 80*l.*, and also a young horse; and on the trial it appeared that the promise was not merely as stated, but also that the defendant should *warrant the horse to be sound*, and that he *had never been in harness*; held that the contract was sufficiently stated: for as the plaintiff had stated those parts of the defendant's promise of the breach of which he complained, that was sufficient without stating other parts of the promise, irrelevant to the breach complained of.

Miles v. Sheward, 8 East, 7; and vide Hands v. Burton, 9 East, 349; 13 East, 20; 1 Camp. 361; 6 East, 564; 4 Barn. & A. 387; 2 Brod. & B. 359.

Where a declaration in debt for rent stated a demise of a messuage, land, &c., and the proof was of a messuage and land, together with the furniture, utensils, and implements, it was held, that as the rent issued only out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of real property, and there was no variance.

Farewell v. Dickinson, 6 Barn. & C. 251.

Customs and prescriptions require to be stated accurately; for they, as well as contracts, are entire, and a slight variance in the proof shows the custom to be a different one from that alleged.

5 Rep. 78 b.

As where a custom was stated, that the lord should have the best beast on

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the tenant's death, and the custom proved was, that the lord should have the best beast, *or good*, the variance was fatal.

1 Bos. & Pul. 394, n.

The rules as to variance are much less strict in actions *ex delicto* than in actions *ex contractu*; for tortious acts are divisible, while contracts are entire. The rule in cases of tort appears to be, that the plaintiff is not bound to prove the whole of his allegations as laid, provided he proves sufficient to show a ground of action, and that his proof, as far as it goes, is consistent with the declaration. Thus where the plaintiff, in declaring for a disturbance of common, stated that he was possessed of a messuage and land, and by reason thereof he was entitled to common of pasture; and the proof was that he was possessed of land only, and entitled to common in respect of it, the allegation was held divisible, and the proof sufficient to entitle him to damages *pro tanto*.

Ricketts v. Salway, 2 Barn. & A. 560.

So where plaintiff declared against the sheriff for a false return of *nulla bond* to a *fi. fa.* against the goods of R. and J. Stone, and alleged that R. and J. Stone had goods in his bailiwick, and the plaintiff did not prove that R. Stone had any goods there, the proof was held to sustain the allegation, for it was severable, and meant that both or either of them had goods, &c.

Jones v. Clayton, 4 Maul. & S. 349; and vide 1 Stark. 48.

So where the plaintiff, in declaring for slander, averred by way of inducement, that he was a carpenter and appraiser, and that the defendant intending to injure him in his several trades, spoke the words of and concerning the plaintiff in his trade of a *carpenter*, and the plaintiff failed in proving himself an *appraiser*; it was held that the allegation was divisible, and that the plaintiff might recover on proof of his being a carpenter only.

Figgins v. Cogswell, 3 Maul. & S. 369; and see, as to variances in stating slanderous words, 6 Bing. 48, and tit. *Slander*, *post*.

In the above cases the evidence was consistent with the declaration as far as it went, only that the whole allegations in the declaration were not proved. Where, however, the evidence is *inconsistent* with the declaration, so as not to establish any ground of action set forth, there the variance is fatal in actions of tort, as well as in actions of contract.

As where the declaration alleged that the defendant's dogs were accustomed to worry and bite sheep and lambs, and the evidence was, that the dogs were ferocious, and had frequently attacked men; the court held, that the evidence did not support the declaration, although it would have been sufficient to have alleged generally, that the dogs were of a mischievous disposition and unfit to be at large.

Hartley v. Harriman, 1 Barn. & A. 620.

So where in case the declaration alleged that the defendant maliciously charged the plaintiff with a felony before a magistrate, and it appeared in evidence that the charge only amounted to a tortious conversion of goods, the variance was fatal.

Tempest v. Chambers, 1 Stark. 67; and vide 2 Barn. & A. 756; 6 Taunt. 464.

A great number of the variances between the pleadings and records, and written instruments, which were holden fatal in the above cases, would now be amended at the trial, under the authority of a late salutary act.

By that act, 9 G. 4, c. 15, intituled *An Act to prevent a failure of justice*

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*by reason of variances between records and writings produced in evidence in support thereof*, reciting "That great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital and setting forth thereof upon the record upon which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time; it is enacted, That it shall and may be lawful for every court of record holding pleas in civil actions, and judge sitting in *nisi prius*, and any court of oyer and terminer and general jail delivery in England, Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record upon which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable; and hereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be endorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

Where, in case for a malicious arrest, the declaration alleged that the defendants did not prosecute the suit complained of, *but therein made default, and their pledges were in mercy, &c.*, and the proof was that the action was discontinued, this was adjudged a fatal variance; and it was held not amendable under the above act, not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof.

Webb v. Hill, Moo. & Malk. Co. 253. See Briant v. Eicke, where an amendment was allowed. Ibid. 360.]

In an action of debt for an escape of one in execution, it is not sufficient to show only that a *capias ad satisfaciendum* issued, by virtue of which he was taken, &c., but the plaintiff must show how he recovered judgment, and thereupon a *capias ad satisfaciendum* issued, &c.; for as to the judgment the defendant may plead *nul tiel record*; and though, if there was no judgment, the sheriff was bound to execute the writ, and perhaps might be fined for the escape, yet, if there was no judgment, there was no debt or duty to the plaintiff.

Sand. 38, 39; Jones v. Pope, Lev. 191; 2 Keb. 93; Sid. 305, S. C.—That the cause for which arrested must be shown and proved. Lev. 85, 2.—But for what is necessary to be shown in the declaration, vide Carth. 149; Lutw. 110, 111; 2 Show. 17, pl. 10; Salk. 272, pl. 3; 5 Mod. 414.

If in an action for the escape of B, against the warden of the Fleet, the plaintiff declares that B was committed in execution to him, he must conclude *prout patet per recordum*; for that is triable by the record, though said to be helped by the defendant's pleading that he suffered him to escape with the leave of the plaintiff.

3 Lev. 393, Norden v. Fox; and vide 1 Lut. 111, and 6 Mod. 8, 9, that where a matter of record is the foundation or ground of the suit of the plaintiff, or of the substance



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of the plea, there it ought to be certainly and truly alleged; *aliter*, where it is but conveyance; as in escape, the not concluding *proul palet per recordum*, not being the gist of the action, is aided.

In an action for an escape on mesne process, the plaintiff must not only show that *ad largum ire permisit*, but also that *non comperuit ad diem*; because the party being bailable, the sheriff might lawfully suffer him to go at large; though in such action upon an escape after execution, it is sufficient to show that *ad largum ire permisit*.

Noy, 72. Vide tit. *Escape*.

In action for the escape of one committed by commissioners of bankrupt for refusing to answer interrogatories, the plaintiff set forth, that upon the petition of him and other creditors the Lord Chancellor by commission *dedit potestatem plenam* to the commissioners *vigore statuti* to examine, &c., and that the commissioners offered him interrogatories, &c. And though it was objected that the office of the chancellor is ministerial only, and that it is the statutes which give the power, and it was not shown what the interrogatories were, yet the declaration was adjudged good; for it is *per commissionem dedit*, &c., *vigore statuti*; and it shall be intended that the interrogatories are lawful till the contrary appear.

Moor, 834; 9 Bulst. 236; Roll. R. 47.

In debt upon an assignment of a bail-bond taken by the sheriff, who had arrested the defendant on a *capias*, it was objected that the plaintiff had not in his declaration set forth the *capias*, or the *teste*, or return of any *capias*; and this on special demurrer was held fatal, it being the *capias* that gives life to the bond.

Mod. Cases, 78, Tucker v. Goldburne.

If in an action of debt upon an award, the plaintiff declares that the arbitrators did make an award that the defendant should pay unto the plaintiff 10*l.* &c., this is a good declaration, though nothing is shown to have been awarded on the other side; for it is sufficient (a) for the plaintiff to set forth that part of the award that entitles him to his action.

Leon. 72. (a) The plaintiff may declare, &c., that *inter alia* it was awarded; per Lit. Rep. 312. But 1 Mod. 36, per Twisden, *cont.*; but for this vide tit. *Award*.

If in an *assumpsit* the plaintiff declare that the defendant, in consideration that the plaintiff would forbear him one week, assumed, &c., and aver that he did forbear him one week, but say not one week following; yet this is a good declaration, for it must necessarily be intended so.

Cro. Eliz. 272, Tenacy v. Brown. {See 4 Bos. & Pul. 172, Marshall v. Birkenshaw.}

If in an *assumpsit* the plaintiff declare, that whereas there was a certain bargain between the plaintiff and the defendant for certain woods for which the plaintiff was to pay 20*l.* at a day after; and that the defendant, in consideration that the plaintiff *asportarat sufficiensdum hominem fore obligat.* to the defendant for the payment of the said 20*l.*, did assume and promise that the plaintiff should enjoy the said wood, &c., and the plaintiff *aver quoad asportavit B sufficientem hominem fore obligat.* to the defendant, &c., yet this is no good declaration: 1st, Because it is not shown (b) how he was sufficient, so that it may appear to the court to be according to the agreement; 2dly, Because it is not in fact shown that B(c) did become bound, or that *obtulit se obligari*, and perhaps he came to be bound, but being there refused.

Yelv. 49, Allen v. Randall. (b) Vide Hob. 69, 70, 77, 1 Mod. (c) In an action upon promise to repay money laid out, or to be laid out, for goods for the use of the

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defendant, the plaintiff need not aver that the goods came to the hands of the defendant. Bulst. 169, adjudged.

If in an *assumpsit* the plaintiff declare that his father was seised of the manor of D, and of divers lands, &c., in D in fee, and in consideration that the plaintiff, together with his father, *sigillaret quandam indenturam per quam* his father *barganizaret*, &c., the said manor and lands, the defendant did assume, &c., and allege, that the plaintiff such a day *sigillavit indenturam predict.*; yet the defendant, &c.; this is no good declaration; for *diversa terras et tenementa in D*, are uncertain, and comprehend not all his lands in D, and therefore the plaintiff ought to have shown in certain and particularly what lands were comprised within the indenture.

Yelv. 110, Lord Mordant v. Walden, adjudged.

Also, in the above case it was held, that the allegation that he had sealed *indenturam predict.* was not good; for *predict.* ought to refer to some certainty before, but (a) *quandam indenturam* is altogether uncertain: and the plaintiff should have showed in certain that he sealed such an indenture *per quam* the plaintiff and his father *barganizaverunt*, &c. *de verbo in verbum*, as laid in the premises of the declaration.

Yelv. 111, adjudged. (a) The plaintiff declared, that whereas *quendam pars domus*, &c., was out of repair, the defendant, in consideration that the plaintiff would repair *eandem partem* of the said house, assumed and promised, &c., and avers, that he did repair *eandem partem*; and though it was objected the plaintiff should have showed which part of the house was out of repair, yet after a verdict it was adjudged for the plaintiff. 2 Leon. 53; 3 Leon. 91.

But if a perfect indenture in date, in the nomination of the parties and limitation of the land, had been mentioned before, it had been sufficient to say, that they sealed *indenturam predict.*, because by the premises it appears there was *in facto* a true and perfect indenture.

Yelv. 111, *per cur.*

The plaintiff declares, whereas he and the defendant were joint executors, and the defendant had received all the estate of the testator, and the plaintiff threatened to sue the defendant for one moiety, the defendant, in consideration the plaintiff would forbear, &c., and would show an account concerning the testator's estate, did assume, &c.; and the plaintiff avers, that he did show *quoddam compotum*; and though not said *compotum predict.*, yet after a verdict for the plaintiff it was adjudged for him.

Raym. 203, 204.

If in an *assumpsit* the plaintiff declare, that the defendant, in consideration that the plaintiff would lease certain lands to the defendant, rendering 10*l.* *per ann.*, the defendant did assume and promise to, &c., and aver, that he did make a lease of the said lands, but do not say that it was rendering 10*l.* *per ann.*; this is no good declaration.

3 Bulst. 35, Lee v. Adams, adjudged after verdict for the plaintiff.

If in an *assumpsit* the plaintiff declare, that whereas the defendant had committed a felony, and thereupon had requested the plaintiff to do his endeavour (b) to procure a pardon for the defendant; and thereupon the plaintiff by all the means he could, and many days' labour, did his endeavour to obtain a pardon for the said felony, viz., in riding and journeying, at his own charge, from London to N, where the king was, and so to and from Newmarket to obtain a pardon, &c.; this is a good declaration, (c) though nothing in particular is laid to be done, but only riding up and down, and nothing done when he came there: for an endeavour in general is ex-

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pressly laid, and particulars ought to be set forth for form's sake only; for though upon the trial he could have proved no riding nor journeying, yet any other effectual endeavour, according to the promise, would have served.

Hob. 105, 106, *Lamphleugh v. Blaithwait*, adjudged *per totam cur. præter Warburton*; and the rather, because it was after verdict. Moor, 866; Brownl. 7, S. C. (b) Stile, 465, like point, where the defendant did his endeavour to reconcile differences, &c. (c) But if the plaintiff declare that the defendant, in consideration the plaintiff had done him *mulla beneficia*, assumed and promised, &c., this is not good. Vent. 27; Sid. 413, adjudged, after verdict for the plaintiff; and vide 2 Keb. 552.

In *assumpsit* the plaintiff declared, that in consideration the plaintiff would deliver all the corn in a certain barn, the defendant did assume and promise, &c., and avers, that he did deliver all the corn in the barn, but does not show that there was any corn there; and it was agreed *per curiam*, that had this been on a demurrer, the declaration would not be good; but that being after a verdict, upon *non assumpsit* pleaded, by which issue it was admitted there was corn there, it was adjudged for the plaintiff, and afterwards affirmed upon a writ of error.

Roll. R. 382.

|| And where in debt on bond conditioned that A B should account for all moneys received by him, the defendant pleaded performance generally; the plaintiff in his replication assigned for breach, that A B was requested to account, and refused; it was held, on special demurrer, that this assignment of the breach was bad, in not alleging that A B *had received* moneys.

Serra v. Wright, 6 Taunt. 45.||

If in an *assumpsit* the plaintiff declare, that whereas J S had acknowledged himself to be indebted to the plaintiff in 10*l.* for divers trespasses, which 10*l.* the plaintiff at the defendant's request had accepted; and that the defendant, in consideration the plaintiff would acquit and discharge the said J S of the said debt, and would permit the said J S to carry out of the plaintiff's house certain goods, did assume and promise to pay the said 10*l.* to the plaintiff; and allege *in facto*, that he did acquit and discharge the said J S, and did permit the said J S to carry away the said goods; this is no good declaration, because he doth not show how he did acquit the said J S, for it could not be without deed, which ought to have been particularly shown; and though the performance of the other part of the consideration is sufficiently averred, yet that will not help it.

Cro. Ja. 503, *Lenerett v. Rivett*, adjudged; || *Gregory v. Nevill*, Cro. Eliz. 292.||

If in an *assumpsit* the plaintiff declare, that whereas there was a certain discourse between the plaintiff and defendant concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant; and thereupon the defendant, in consideration the plaintiff would do his endeavour and labour to persuade his nephew to marry the niece of the defendant, did assume and promise to pay the plaintiff, &c., and aver, that such a day, and divers other days and times *omnibus modis quibus poterat conatus suit et elaboravit suadere* his said nephew to marry the defendant's said niece, &c., this is a good declaration, without showing in particular how he did his endeavour; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c., the record would be too long.

Raym. 400, *Aglionby v. Towerson*, adjudged, after verdict for the plaintiff. Moor, 595, like point adjudged.



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verdict for the plaintiff, it was moved in arrest, that the declaration was not positive, but by way of recital only, and so doth not directly charge the defendant with the crime intended: *sed per curiam*, The plaintiff shall have judgment; for all the precedents in the like cases are after this manner; as, in debt upon the statute of tithes, &c. Moreover, this is an action of debt, wherein the offence is only an inducement to the action; for it is the non-payment of the penalty which is the original cause.

Carth. 216; Show. 337, Mullacke, *qui tam*, v. Speering.

In trespass the plaintiff declared *quare* (a) *vi et armis clausum fregit*, and after verdict for the plaintiff judgment was arrested; for *quare* is not positive but interrogatory, and much worse than *quod cum*.

2 Salk. 636, pl. 2, Hore v. Chapman. (a) This is the form in the writ, but the count must contain a positive allegation.

It hath been held a good declaration to say *quod defendens quendam canem ad mordendum oves consuetum scienter retinuit*, without saying, *quod retinuit quendam canem sciens canem prædict. ad mordendum oves consuetum*, for this is tantamount, for the word *scienter* goes to all the precedent matter; and the court said the *sciens* was not (b) traversable, but ought to be proved in evidence, and that otherwise the action did not lie.

For this vide Roll. Abr. 4; Cro. Car. 254, 487; 2 Sid. 127; 4 Co. 18; Dyer, 25, 286; Allen, 92; 2 Bulst. 291; 3 Bulst. 76; Sid. 21; Roll. R. 43, 193.—In case for selling two oxen, affirming they were his, the defendant's, whereas in truth they were the property of J S, without alleging, that he *sciens* they were the property of J S, yet the declaration was held good. Carth. 90.—(b) The general issue is in fact a traverse of the *sciens*, for unless the plaintiff on the trial prove the defendant knew his dog was accustomed to bite sheep, his cause of action falls to the ground, as in such case the defendant is not guilty of any thing which can entitle the plaintiff to an action. ¶ See Ld. Raym. 608; 1 Barn. & A. 620; 1 Stark. Ca. 285.¶

In debt upon an obligation, the condition whereof was to perform all covenants comprised within certain indentures, bearing even date with the said obligation, and in truth, both obligation and indentures were without date: it was held, that the plaintiff ought to have averred a date of obligation, and that the indentures bore equal date therewith.

Noy, 21.

If in an *assumpsit* the plaintiff declare, that whereas it was agreed between the plaintiff and one A, that the said A should lease a certain house to one B for seven years; and it was also agreed, that B, during the said term, should repair the house with tile and slate only, and thereupon an indenture was drawn; but because there was a covenant therein, that B should be bound to all manner of reparations, B refused to seal the said indenture, and the plaintiff refused to seal a bond for performance, &c.; and further show, that in the said house there was a great wall, part whereof was ruinous, and likely to fall during the said term; and that the defendant, in consideration of the said B would seal the said indenture, and the plaintiff would seal the said bond, did assume and promise, that he, the said defendant, would maintain and uphold the said wall *durante prædict. termino 7 annorum*; and aver that the said B the said indenture, and the plaintiff the said bond, did thereupon seal; and in fact say, that the said wall, during the said term, did fall, &c.; this is no good declaration, because not expressly averred that A did demise the said house; and if there was no demise it was not possible for the defendant to repair it during the term; and, for any thing that appears, the indenture was sealed only on the part of the lessee, and not on the part of the lessor.

Yelv. 18, Soprani v. Skurro, adjudged.

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If in an *assumpsit* the plaintiff declare, that whereas the defendant had distrained six oxen of the plaintiff's for a quit-rent due to the bailiffs of B, and thereupon the defendant, in consideration that the plaintiff would pay the money for the redemption of his said cattle, did assume and promise, upon request, to show to the plaintiff, or to such other person or persons as he should name, a sufficient record to charge the said lands with the said quit-rents; and allege, that he appointed B to see the said record, and requested the defendant to show it B accordingly; but that the defendant had not shown to the said B any sufficient record to charge the said lands, this is a good declaration; for though the sufficiency of the said record is not triable *per pais*, and the plaintiff might have averred a breach generally, *scilicet*, that he did not show any record, yet this is sufficient and most proper for the plaintiff to lay the breach according to the promise; and in this case the defendant may plead that he did show *tale recordum* reciting it, and conclude, which was sufficient; and thereupon the plaintiff may demur, and put the sufficiency thereof to the judgment of the court.

Yelv. 38, Heyford v. Reeve, adjudged.

If in an *assumpsit* the plaintiff declare that the defendant, in consideration of, &c., assumed and promised to take the son of the plaintiff to be his apprentice for seven years, and to find him meat, drink, and apparel, &c., during the term, but aver that he did not find him meat, drink, and apparel, &c., but do not aver that he did put him, or that the defendant did accept him as his apprentice, this is no good declaration; for it ought to appear that he was his apprentice, else the defendant was not bound to provide for him.

Cro. Ja. 406; 3 Bulst. 221; Roll. R. 414, Talker v. Wrigg.

If in an *assumpsit* the plaintiff declare upon a promise made by the defendant to pay 50s. to the plaintiff when the defendant should have received the money, and aver that the defendant hath received the money, but yet hath not paid, &c.; this is no good declaration, because it doth not appear how much money the defendant hath received, and perhaps he hath not received so much as 50s., and though the promise is general, yet the breach ought to be laid so as to be adequate to the consideration. (a)

Mod. 169; agreed *per cur.*, but being after a verdict adjudged for the plaintiff. (a) The best method would have been to have declared generally, that the defendant was indebted to him 50s. for money had and received by defendant to the plaintiff's use, and being so indebted he promised to pay; and then, on proving any part received, the plaintiff would have been entitled to his verdict, and the declaration would not be liable to any exception.

If in an *assumpsit* against an executor the plaintiff declare that the testator of the defendant, in consideration of, &c., did assume and promise that he would leave the wife of the plaintiff as good a portion as he should give to any of his children; and aver, that the testator to such a daughter *dedit* such a portion, but did not leave, &c.; this is no good declaration, because it does not appear when he did give this portion, and perhaps it might be before the promise.

Latch, 203, by the Judges against one, after verdict.

||The rules as to certainty in pleading have been laid down by Lord Coke, thus—There are three kinds of certainty: 1st, To a common intent, and that is sufficient in a bar which is to defend the party and to excuse him; 2dly, A certain intent *in general* as in counts, replications, and other pleadings of the plaintiff; that is to convince the defendant, and so in indictments, &c.;

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3dly, A certain intent in every particular, as in estoppels. De Grey, C. J., lays down the following rule as to the certainty requisite in indictments and criminal informations—"The charge must contain such a description of the crime that the defendant may know what crime it is that he is called on to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty, and that the court may see such a definite crime, that they may apply the punishment which the law prescribes;" and this rule seems applicable to the declaration in civil cases.

Co. Lit. 303 a; Rex v. Horne, Cowp. 682. Vide also 2 H. Black. 550; Dong. 159.

With respect to the last and highest degree of certainty mentioned by Lord Coke, he himself has said elsewhere, that it is rejected by the law; for *nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit*. It appears, however, to be requisite in case of estoppels, and in pleas not favoured be the court, as the plea of alien enemy, which must negative every presumption that could arise in favour of the plaintiff's right to sue.

Long's Ca. 5 Rep. 121; Casseres v. Bell, 8 Term R. 166.

Notwithstanding Lord Coke's rule, that certainty to a common intent is sufficient in a bar, it must be observed, that in many instances greater certainty is requisite in a plea than in a declaration; thus in stating a contract to pay the debt of a third person, it is necessary in a plea to state it to be in writing according to the statute of frauds, but it is otherwise in a declaration.

1 Saund. 276 a, n. 2.

So we have seen, that in a plea the statement of a deed by "*testatum existit*" is insufficient, but it is otherwise in a declaration.

Ibid. 274, n. 1.

Less certainty is requisite where the subject lies peculiarly in the notice of the opposite party; therefore where a party lays a charge upon another (as a liability to repair) by reason of his estate, it is not necessary to show by what right the charge attaches on him, but it is enough to state that he was bound as occupier, &c.; but a party prescribing in right of his *own estate*, must show what estate he has.

Com. Dig. Plead. (C), 26; 3 Term R. 768

So also a less degree of certainty is requisite in stating what is only inducement to the action, than in stating the *gist* of it.

Com. Dig. Plead. (C), 43.

So also in stating the special damage, except in cases where the special damage is the *gist* of the action.

1 Keb. 825. Vide, on the subject of certainty in pleading, 13 East, 102; 14 East, 291; Archb. on Plead. 106, 107, 108, 109; 1 Chit. on Plead. 236, 237, 238; Stephen on Pleading, 379.

#### 5. Of the Certainty required in the Description of the Thing declared for; and of time, place, and other circumstances.

The law requires no greater certainty than the (a) nature of the thing will admit of; as where an action is brought for things not subject to distinction by number, weight, or measure; as, in trespass for breaking his close with beasts, and eating his peas, without saying how much; yet this declaration hath been held good, because nobody can number or measure the peas that beasts can eat.

For this vide tit. *Trespass*. (a) That where the thing is well described, the court  
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ought not to be too strict in scanning the words; and that if the thing is so described that the jury may know what is meant thereby, it is well enough. *Süle*, 136, 235.

¶ In an action for a fraud in representing a machine, in a sale of the patent right, as capable, if constructed and worked as described by the defendant, of performing a certain quantity of labour, where the declaration averred that though so constructed, it would not perform the work; held, that it was unnecessary to set forth the manner of the construction.

*Corwin v. Davison*, 9 Cowen, 22.*g*

¶ But where the declaration stated, whereas heretofore, &c., the plaintiffs had agreed to purchase, and the defendants to sell, and deliver to the plaintiffs *at a certain rate or price per pound to be paid in manner stipulated*, forty bags of wool, to be delivered at a time which before the making of the promise of the defendants after mentioned had elapsed, but which wool was not delivered; and thereupon, in consideration of the premises, and that the said plaintiffs would still receive and pay for the said wool *at the rate or price last aforesaid*, the defendants promised to deliver the wool within a reasonable time, and then averred that the plaintiff was ready, &c., to receive and pay for the wool *at the rate or price and in manner last aforesaid*, yet the defendants would not deliver; it was held, on special demurrer, that the declaration was too general, since no price and manner of payment were specified, although referred to and incorporated with the consideration and promise.

*Andrews v. Whitehead*, 13 East, 102; *sed vide Wildman v. Glossop*; 1 Barn. & A. 12; *Ward v. Harris*, 2 Bos. & Pul. 265.¶

So where there are several parts which compose an aggregate body, there it is sufficient to mention the body, and it is not necessary to ascertain the several parts; as trover for a ship and sails is good, because the sails go to make up the aggregate body; but if it had been for sails only, it would not have been good without specifying the number and quality: so trover lies for a library of books. (*a*)

For this *vide tit. Trover, post.* (*a*) *Sed qu.?*

If in trover the plaintiff declare for two pair of pothooks, &c., and hangers; this declaration is not good, because of the uncertainty of the word hangers; and they cannot be intended such upon which the pothooks used to hang, because they do not immediately follow the word pothooks; but there are several other words between them.

¶ See 1 Vent. 114; ¶ Raym. 2, *Seaman v. Barnes*, adjudged.

So trover for a beam, and scales, and weights, is not good for the weights, because there may be more or less of the weights used with the scales, and therefore altogether uncertain as to the quantities or weights of them.

*Vide tit. Trover*; ¶ *sed vide* 2 Will. Saund. 74 a.¶

If in trover the plaintiff declare *pro decem paribus velorum et tegulorum*, *Anglicé* curtains and vallance; this is a good declaration, and certain enough, and shall be intended for ten pair of curtains, and ten of vallance; and in such artificial things there needs no other description than to name them by their usual names by which they are commonly called, without showing the quantity of yards or stuff of which they are made.

2 Saund. 74, *Taylor v. Wells*, adjudged.

Where a thing is laid in the declaration by way of aggravation, though such allegation is uncertain, or that circumstance is not proved to the jury, yet this shall not arrest the judgment; because the gist of the action is the



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thing itself in demand, and the aggravation is only the manner of doing it; and though this may increase the damage something, yet it is not to be out of proportion to the thing in demand; as, if trover be brought for a box of writings,<sup>(a)</sup> and charters or vestments, this is good, because the trover is for the trunk, and for the detention of the goods therein, which are withheld by the detention of the trunk, but not for the value of the goods; and therefore anciently they held that trover lay only for a trunk locked, but now they admit it though the trunk be not locked, because the detaining is still the same.

Vide tit. *Trover*, and the several authorities there cited. (a) If for writings, the plaintiff perhaps had better sue in detinue, as on recovery in that action he will be entitled to a return of the thing in specie besides damages for the detention.

In an action upon the case for setting a house on fire *per quod* (amongst divers other goods) *ornatus et equis aratris et carucis amisit* was held certain enough: so if he had mentioned only *diversa bona*; for when a man's house is burnt, he cannot set forth the certainty of the goods he lost.

Keb. 825, *Prior v. Dawkes*.

But, where in an action on the statute of *hue and cry*, the plaintiff declared that he was robbed of a certain sum of money, *ac diversa bona et catalla in custodia ipsius*, to the value of 30*l.*, and because he had not set forth the goods particularly, and that he had not likewise alleged that they were his goods, it was held that as to this part he could not have judgment.

2 Saund. 379.

Declaration in trespass for breaking his close and taking away his fish, without expressing either the number or nature of them, was held insufficient: but in an indictment for taking fish out of a pond, the number need not be expressed, for damages are not to be recovered; but the party is to be fined according to the circumstances of the fact, and not according to the number of the fish.

5 Co. 34; *Playter's case*, Vent. 272; and vide 1 Vent. 329. ¶ But this omission would now, it seems, be cured by verdict either at common law, Cro. Ja. 435; or by the statute of jeofails, 16 & 17 Car. 2, c. 8, and after a general demurrer, or judgment by default, by 4 Ann. c. 16, § 1, 2; and see 2 W. Saund. 74.¶

So, trespass *quare arbores succidit ad valentiam, &c.*, was held insufficient for not expressing the kind of trees.

Vent. 53.

¶ The law does not now require the same precision and certainty as formerly in describing the goods taken, whether in trespass or trover: if they are described according to common acceptance it is sufficient.

2 Will. Saund. 74 a, and cases there collected.

But it is bad, even after verdict, to say merely "divers goods and chattels of the plaintiff," and judgment will be arrested.

Lord Raym. 1410, 1007; 1 Stra. 637; Burr. 2455.

And so it has been held in replevin after judgment by default.

*Pope v. Tillman*, 7 Taunt. 642; 1 Moo. 386, S. C.

And where the declaration was for seizing *one hundred articles* of furniture, and *one hundred articles* of wearing apparel, without describing them, it was held bad on general demurrer.

*Holmes v. Hodgson*, 8 Moo. 379.¶

β A declaration containing two counts, in one of which a cause of action

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is alleged which had not accrued at the commencement of the suit, a general verdict rendered for the plaintiff is bad.

*Stewart v. M'Bride*, 1 S. & R. 202.

When it appears from the declaration that the money sued for was not due, until after the commencement of the suit, a judgment for the plaintiff is erroneous.

*Gordon v. Kennedy*, 2 Binn. 287; *Cheetham v. Lewis*, 3 Johns. 42; *Warning v. Yeates*, 10 Johns. 119; *Alaire v. Ouland*, 2 Johns. Cas. 52.

When no venue is laid in the body of the declaration, the venue in the margin is sufficient.

*State v. Post*, 9 Johns. 81.

A declaration on a bond conditioned to pay a judgment in three months, or surrender the body of the defendant in execution, at the suit of the plaintiff in thirty days thereafter, must aver the taking out execution by the plaintiff, that being a condition precedent.

*Whitney v. Spencer*, 4 Cowen, 39.

When a statute which gives a penal action contains a proviso or exception merely furnishing matter of excuse or justification to the defendant, the plaintiff need not negative it, but the defendant must plead it.

*Teel v. Fonda*, 4 Johns. 304; *Bennett v. Hurd*, 3 Johns. 438.

In declaring on a specialty it must be averred that it was sealed.

*Van Santwood v. Sandford*, 12 Johns. 197.

When the merits of the case are affected by the time when a deed becomes valid, the time of delivery should be stated and shown, for the delivery gives it effect as a deed.

*Thompson v. Corwin*, 9 Cowen, 255.

A contract may be set forth in pleading according to its legal effect, though this vary from the precise words.

*Tompkins v. Corwin*, 9 Cowen, 255. See *Grannis v. Clark*, 8 Cowen, 36.

The plaintiff in his declaration must not only show that the debt is due to him, but that the defendant is liable to pay it.

*Dickinson v. Brick*, 2 Penning. 694.

In an action of debt against a security, on a bond with a condition for the faithful performance of duties as cashier of a bank, it is not necessary for the plaintiff to set out the breaches in the declaration; he may do so in a subsequent part of the proceedings.

*Chetwood ads. State Bank*, 2 Halst. 32.

In an action by an endorsee of a promissory note, it is sufficient for the plaintiff in his declaration to say of the defendant, that he "then and there endorsed the same to the plaintiff, and the defendant then and there promised the plaintiff to pay him the amount of the said note, according to the tenor and effect thereof, and the endorsement." It is not required to prove on the trial that the notice of the transfer was given to the defendant; the allegation of notice to the defendant is therefore unnecessary.

*Elmendorff v. Shotwell*, 3 Green. 153.

The charter of the city of Newark, requiring the collector to pay the taxes, when received, to the *treasurer*, and the declaration charged him with a breach of his official bond, in not paying over such money to the *mayor*, &c., is bad on demurrer.

*Mayor, &c., v. Davis*, 3 Har. 21.g

## (B) The Declaration.

## 6. Of the Declaration's being good in Part, and void in Part.

It seems to be now agreed, that if a declaration be good in part, though bad as to another part, that the plaintiff is entitled to judgment for so much as is well alleged, especially if it be not of an (a) entire demand: also, where the jury find greater damages than the party declares of, the court may, to prevent error, give judgment for so much as the party declares of, *nullo habito respectu* to the rest: also, the party may (b) release the overplus, and take judgment for the rest.

Roll. Abr. 784, 785; 10 Co. 115; Yelv. 45; 2 Show. 103. (a) Vide 1 Vent. 27; Hob. 178, 189.—That if one brings an action for two things, and of his own showing it appears that he cannot have an action for one of them, or a better writ, there the writ shall be well for that part for which it is good. 11 Co. 45, Godfrey's case. (b) Where the plaintiff may release damages for part, and take judgment for the rest, vide F. N. B. 107; Moor, 281; Leon. 92; 2 Bulst. 280; Brown, 235; Stile, 364; Hard. 58.

As, where the party avowed for 5*l.* rent, and a *nomine pænæ* for non-payment at the day, but laid no actual demand of the rent, the avowry was held naught as to the *nomine pænæ*, because it could not be forfeited without a demand of the rent; yet he had judgment for the return of the cattle, because he had a lawful cause to distrain for rent arrear and the demands were several.

Hob. 133, Howell v. Sambeck.

So, where the plaintiff brought an action of debt upon the statute of usury, and declared that the defendant *corruptivè* did lend 40*l. cont. formam statuti*, and such a day did also lend 20*l. contra formam, &c.*, but did not say *corruptivè*; upon *nil debet* pleaded, the plaintiff had a verdict, and it was moved in arrest of judgment that the declaration was not good for the last 20*l.* because it wanted the word *corruptivè*; but, notwithstanding, the court gave judgment for what the plaintiff had well declared, and a *nil capiat per billam* was entered as to the residue.

Cro. Ja. 104; Woody's case, 1 Saund. 286.

So, if in trespass the plaintiff declare for taking the mare of the plaintiff, and several goods, but do not say of the plaintiff, and thereupon the defendant demur, the plaintiff may have judgment for the mare, and release the action for the rest.

Raym. 395, Cutworthy v. Taylor. β See Grannis v. Clark, 8 Cowen, 36.g

So, if an action of debt be brought upon several bonds, and it appear that one is not due, the plaintiff may recover the rest.

Hob. 178; Saund. 286.

In ejectment if (c) part of the things be well demanded and others not, and a verdict be given for the plaintiff for the whole, and entire damages, the plaintiff may release all the damages in that which is not well demanded, and pray judgment for the residue.

Roll. Abr. 785; Cro. Car. 458. (c) As, in ejectment of land and a free fishery, because an ejectment does not lie of a free fishery. Cro. Ja. 144, 146; 1 Roll. Abr. 784.—So in an *ejectione custodiæ et hæredis*, where it does not lie of the custody of the heir, but of the land only. Dyer, 369; 10 Co. 130; 5 Co. 108; 2 Bulst. 28.—So, in an ejectment of a messuage, cottage, and tenement, if it be found for the plaintiff, and one entire penny damages given to the plaintiff for the whole, because an ejectment does not lie of a tenement, the plaintiff may release all the damages, for that it is entire, and have judgment for all the land, saving the tenement. Cro. Eliz. 186; 3 Leon. 128; 2 Bulst. 28; Stile, 30. ¶ And the court will allow the verdict to be entered for the messuage, omitting the tenement, *without* releasing the damages. 8 East, 357; and see 1 East, 441.¶

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In a writ of debt for 100*l.* against an executor, if the plaintiff count upon an obligation for 99*l.*, and upon a *mutuatus* by the testator for 20*s.*, and upon the issue the jury find for the plaintiff in the whole, and assess damages entire, where it appeared no action lay against the executor upon the *mutuatus* of the testator; yet, if the plaintiff release the 20*s.* and all the damages, he may have judgment for the residue.

Roll. Abr. 784, Ashford's case; 2 Sand. 286, like point.

In debt for rent the plaintiff declared for more than was due upon his own showing, and upon *nil debet* pleaded, the plaintiff had judgment, and damages and costs: and it was moved in arrest of judgment, that the plaintiff had made an (a) entire demand for rent to a certain sum, when it appeared that he could not have an action for so much: yet the court held, that he might release the surplus and damages, and take judgment for the residue.

Roll. Abr. 785; Barber v. Pomeroy, Stile, 175; and vide Allen, 29. (a) In all actions of debt the plaintiff is privy to the sum in demand, and therefore ought at his peril to declare for the true debt; and the reason why he ought to demand the very sum is, because if he should do otherwise, and recover, he might afterwards bring an action for the true sum, and so the defendant would be doubly charged; and therefore in debt on a bond, if the plaintiff declares for less than is due, he shall never have judgment. 2 Roll. R. 54, 55; 5 Mod. 213, cited. [It is not true, that in debt the plaintiff should demand the very exact sum due, that he cannot recover any other sum than that which he demands. Many instances might be given where this action lies, and yet where it is impossible to state the demand with precision, as, in debt against a tenant who holds over, under the stat. of 4 G. 2, c. 28, for *double the value of the land*; or in debt for *treble the value* for not setting out tithes, under the stat. of 2 & 3 Ed. 6, c. 13; or, for the *value of foreign money*. In all these cases the extent of the demand is uncertain at the commencement of the suit; the *value* is to be found by a jury. But if the declaration import a title to a fixed, gross sum, to a duty numerically certain, there, the evidence must show a right to that very sum, else the very gist and foundation of the action fails. But this is not peculiar to the species of action; in *assumpsit* as well as debt the case proved must be consistent with the declaration; the proof must be commensurate with the allegation. Walker v. Whitter, Dougl. 6; Aylett v. Lowe, 2 Black. R. 1221; Rudder v. Price, 1 H. Black. 249, 550; Grant v. Astle, Dougl. 731.] [These cases last cited, and 11 East, 62, entirely establish that, in debt on simple contract, the plaintiff may prove and recover less than the sum mentioned in the declaration. But, if debt is brought upon a covenant to pay a sum certain, a variance in the statement of the sum in the deed will be fatal. See 2 Ld. Raym. 816.]

If there be a certain stated sum specified in the deed itself, *that* shall not be abridged by any *remittitur* or release of the plaintiff, if he declare upon that deed; as, if a man bring debt upon a bond of 30*s.*, and declare upon a bond of 20*l.*, this will be bad; because he has brought his action for more than is due, and this rests upon the deed only, and the sum in it does not amount to his demand. But if the action be brought upon a deed which refers to a matter of fact, that makes the duty more or less; if then the fact which is referred to will entitle him to a less sum only, and he demand more than the fact which the deed refers to upon (b) computation will entitle him to; there, let him remit so much of his demand as the fact does not make out, and it will be well, and he shall have judgment for the rest; for that fact which is not made out is not contradicted by the deed.

7 Mod. 87; per Holt, C. J., 2 Salk. 658, pl. 3, S. C.; 2 Ld. Raym. 814, S. C. (b) As in debt for the arrears of rent, in which the plaintiff declared for more rent, and for a longer time than upon his own showing appeared to be due to him. Sand. 282, Dupper v. Baskervill.—So, where the plaintiff declared for 100*l.* due for so many years, and it appeared upon the record in casting up the sums, that he had declared for 8*l.* too much. 5 Mod. 212, Thwaite et ux. v. Lady Ashfield; Comb. 365, S. C.

*Assumpsit*, and two several counts laid; one was a promissory note, and

## (C) Of Impar lance.

the plaintiff counted thereon as on a bill of exchange, upon the custom of merchants; on *non assumpsit* entire damages were given, and judgment accordingly; and upon a writ of error brought in B. R., it was held, 1st, That the plaintiff could not declare upon the promissory note as upon a bill of exchange: and as there could be no such count or action, so there could be no such damages. 2dly, That they could not reverse the judgment in part, viz.: as to the one count, and affirm it as to the other; and denied Jacob and Mill's case, Hob. 6, and took this difference, viz.: where the judgment is partly by the common law and partly by statute it may be reversed in part, for that which was a judgment at common law will remain a judgment and be complete without the other.

Salk. 24, pl. 8, Cutting v. Williams; 7 Mod. 155, S. C.; 2 Ld. Raym. 825, S. C.; 11 Mod. 24, S. C.

¶ And it is a settled rule, that where there are several counts, and a verdict is entered generally on all the counts, and entire damages are given, and one count is bad, it is fatal, and judgment shall be arrested; but if it appears that no evidence at all was given on the bad count, or that the jury calculated the damages on evidence applicable only to the good counts, there the verdict may be amended by the judge's notes.

Doug. 730; 1 Term R. 151; 3 Term R. 435; 6 Term R. 691; 1 Bos. & P. 329; 2 Saund. 171 b.

So, also, where it is expressly averred in the declaration, that the plaintiff has sustained damage from a cause subsequent to the commencement of the action, or to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested.

Doug. 730.

As where the plaintiff declared for taking away his wife, and keeping her till a day which was subsequent to the exhibiting of his bill after verdict, judgment was arrested, because the jury must be intended to have given damages for the *whole time* mentioned.

1 Vent. 103.

But if the time be laid under a *scilicet*, or if an impossible time is stated, there the judgment will not be arrested, although the time be partly subsequent to the commencement of the action.

Vide 2 Will. Saund. 171 a, b, c, d, and the cases there collected.¶

## (C) Of Impar lance: And herein,

## 1. Of the Nature thereof, and the several Kinds.

IMPAR LANCE (a) is, when one, who is to answer to the action of another, desireth some time to advise what he shall answer; and (b) it is nothing else but the continuance of the cause till a further day.

2 Lil. Reg. 41; 2 Show. 310, pl. 321. (a) This *libertas interloquendi* has been thought to arise from a notion of religion, which is mentioned in St. Matthew, chapter v. verse 25: *Agree with thine adversary quickly, whilst thou art in the way with him.* They looked upon the plaintiff at the time of declaring to be in his way towards judgment; and that, therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give him time for that purpose, and therefore *libertas loquendi* was entered on the roll. Gilb. Hist. C. P. 42, 43. β Gould, Plead. ch. 2, § 16.γ (b) When the defendant appears, and the parties by consent obtain a day before the declaration, this is called *dies datus prece partium*. Gilb. Hist. C. P. 41.—A day given before the court is called *dies datus*; but when after, it is called an impar lance. Hard. 365, 366. But for this diversity between an impar lance and

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the *dies datus*, vide Moore, 79, pl. 209; 3 Leon. 14; N. Bendl. 153, pl. 214; Cro. Eliz. 740.

In the Common Pleas they anciently proceeded by original writs, which were warrants out of Chancery for them to proceed; those always gave the defendant notice of the cause of action; and as he had a view of the writ before he appeared, if he had any dilatory plea he was to put it in immediately; but when he pleaded in chief, and came in towards the end of the term, they gave him time to make his defence, which was called imparlance.

2 Show. 444; Skin. 2, pl. 2; Yelv. 211; Lev. 197; Gilb. Hist. C. P. 182.

But in the King's Bench, when the defendant comes in by *latitat*, he does not know, till after his appearance, for what the plaintiff declares; and as he had not sight of the bill before-hand, he had time allowed him to plead any plea in abatement, which is called a special imparlance.

12 Mod. 529.

When the Common Pleas proceeded on *clausum fregit*, as the defendant was under the same disadvantages as when he was arrested on a *latitat*, he had the same privilege as to time to make his objections to the declaration.

2 Show. 310, pl. 321.

This begot the distinction between a general and special imparlances, which latter is again distinguished into the general special imparlance, and that which is still more special.

12 Mod. 529.

The general imparlance is entered on the imparlance roll in the words following, *petit licentiam interloquendi*, which, in the King's Bench, and on *clausum fregit* in the C. B., is entered of course, and is (a) all that is done the first term; but in special originals, returnable in an issuable term, the courts have denied the defendant leave to imparl in order to put off a trial. Also, after this general imparlance, the defendant cannot regularly plead any dilatory plea.

Gilb. Hist. C. P. 183. (a) Imparlanes are now much discouraged, as tending to delay plaintiffs in their just demands. Note: If a declaration be not delivered or filed, and also notice of the filing given before the last four days of term, the defendant is entitled to an imparlance of course.

The general special imparlance is entered thus, *salvis sibi omnibus et omnimodis advantagiis et exceptionibus*; that which is more special is, *salvis sibi omnibus advantagiis, ad breve billam sive narrationem*; (b) the general imparlance is of course, but the special must be obtained from the court.

Gilb. Hist. C. P. 183. (b) Mr. Justice Powell thus lays down the different kinds of imparlanes: there are two sorts of imparlanes; the one general, after which one cannot plead in abatement at all; the other special, with a *salvis sibi omnibus exceptionibus tam ad breve quam ad narr.*, after which one may plead in abatement of the writ and count; and this sort of special imparlance may be granted by the prothonotary: there is another sort of imparlance more special, with a *salvis sibi omnibus exceptionibus et advantagiis quibuscunque*, which cannot be granted without leave of the court, and is discretionary, after which one may plead to the jurisdiction of the court. 12 Mod. 529; 1 Lutw. 46; 2 Bl. R. 1094.—In B. R., on a declaration of Hilary, there may be an imparlance to Trinity term; for it is the course of that court to give imparlance on declaration till the day of pleading. Fletcher v. Richardson, Ca. temp. Hardw. 322. Time to plead is the same as an imparlance. Barnes, 345. β See Steph. on Plead. 90; Lawes on Pl. 93.γ

### 2. What the Defendant must do before any Imparlance.

If a defendant pleads to the jurisdiction of the court, he must do it in

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*stanter* on his appearance; for if he imparls he owns the jurisdiction of the court by craving leave of the court for time to plead in.

Dyer, 210; 1 H. 6, 39; 22 H. 6, 7 a; Palm. 406; Latch. 83; Cro. Car. 9; Stile, 90; Hard. 363; Gilp. Hist. C. P. 183, 184. [But after a general special imparlanee, he may plead to the jurisdiction of the court. 2 Black. R. 1096.]

But the plea of ancient demesne may be pleaded after imparlanee; because the lord may reverse the judgment by writ of deceit, and it goes in bar of the action itself in that court.

Sid. 318; Cro. Car. 9; and vide tit. *Ancient Demesne*. [But see 1 Ventr. 235.] {8 Term, 474, *contra*.}

The defendant after imparlanee pleaded to the jurisdiction of the Court of B. R., that he was a member of the Privy Chamber, and ought not to be sued in any other court without the special license of the lord chamberlain of the household for the time being; this was held an ill plea, and the court offended thereat.

Raym. 34.

If the defendant in a plea of land would have view, he must demand it before imparlanee; for by imparling he undertakes to defend the lands mentioned in the plaintiff's count, and it would be absurd in him to defend what he does not know.

Gilp. Hist. C. P. 184; Dyer, 210, pl. 26. That a view cannot be had, nor non-tenure nor joint-tenancy pleaded, after imparlanee; but in Jenk. 130, it is said a view may be had after imparlanee.—In personal or mixed actions, views may be had on motions made, even after notice of trial, if there is time sufficient. In B. R. a rule for a view is drawn up on motion signed by counsel.

If in (a) dower the defendant pleads *semper paratus*, this must be before imparlanee.

Dyer, 300; Hob. 62. (a) Error on a judgment in dower in *Durham*, where after imparlanee the defendant pleaded detinue of charters and judgment on demurrer for the plaintiff, and that judgment affirmed in B. R. Show, 271, *Burdon v. Burdon*.

So tender and *uncore prist* must be pleaded before imparlanee; for by craving time he admits he is not ready, and therefore falsifies his plea.

Dyer, 300; Hob. 62; Sid. 365; Lutw. 238; 2 Mod. 62.

In *assumpsit* for goods sold the defendant imparled specially with a *salvis sibi*, &c., in common form, and afterwards he pleaded in bar to the action, that he tendered the money demanded to the plaintiff on the very day on which he had laid his request in the declaration, and from that day forward *semper paratus fuit* to pay it, *et profert hic in cur.*; and on demurrer to this plea, one objection was, that this tender could not be pleaded after an imparlanee, being contradictory to that part of his plea, viz. *semper paratus*, and after several debates, the plea was for this adjudged ill; and in this case the court held, that the special imparlanee made no difference, as it appeared thereby that he was not *semper paratus*.

Carth. 413; Salk. 622, pl. 1; Comb. 443; *Giles v. Hart*, 3 Salk. 353; *Ld. Raym.* 254, S. C.

||But it is now settled that a tender may be pleaded after imparlanee, as well as before; though, for avoiding the inconsistency above stated, it must always be entitled of the same term with the declaration; and where it is pleaded after an imparlanee, a judge's order must be obtained in the K. B., or a treasury rule in C. B., for leave to plead it as of the preceding term.

Tidd's Prac. 475, (7th edit.,) and the cases there cited. Vide 1 Saund. 33, note.]

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3. *What he is to plead after a general Imparlanee.*

After a general imparlanee the defendant can only plead in bar to the action, and cannot regularly plead any dilatory plea in abatement; as outlawry, excommunication, joint-tenancy, misnomer, or non-tenure.

2 Roll. R. 58; Jenk. 130. [A plea in abatement after a general imparlanee is bad on a general demurrer. *Buddle v. Wilson*, 6 Term R. 369;] [Lloyd v. Williams, 2 Maul. & S. 484.] [It has been considered too, so far as a nullity, that the plaintiff may sign judgment as for want of a plea. *Doughty v. Lascelles*, 4 Term R. 520;] [Blackmore v. Fleming, 7 Term R. 447. Vide 2 Saund. 2, *notd.*]

But though outlawry after imparlanee cannot be pleaded in abatement, yet if the ground or cause of action be forfeited, as it is in felony, it may be pleaded in bar after imparlanee; so, of a debt certain and due to the outlaw, which vests in the king by the forfeiture, outlawry in the plaintiff may be pleaded after imparlanee, and the turning the remedy from an action of debt to an action on the case, (according to the modern practice to avoid the law-wager,) whereby it becomes uncertain and founds only in damages, shall not divest the king of what he was once lawfully possessed of.

Bro. *Nonability*, 36; 2 Roll. R. 59; Cro. Eliz. 203; 2 Vent. 282; 3 Lev. 29.

So if one be excommunicated after the term to which the imparlanee is, such excommunication may be pleaded after imparlanee.

Doct. pl. 224; Lutw. 1117.

That the demandant is an alien, may, in a real action, be pleaded in bar after imparlanee, as well as to the writ before imparlanee.

Jenk. 130.

After a general imparlanee (a) a feme cannot plead coverture in abatement, but may plead it in bar: (b) but note, that if the marriage was after the cause of action accrued, it must be pleaded in abatement.

Lutw. 23, 1178. (a) In an assize against baron and feme, the feme tenant *per receipt* not allowed to imparl. Dyer, 298, pl. 28.—(b) It hath been a common practice so to plead; *sed qu.* if it can be a good bar, as plaintiff may maintain another action against husband and wife?

So in an action against an executor, he may plead that he is not executor in bar after imparlanee, but not in abatement.

2 Lev. 190; Lutw. 1178.

In an action of debt, the defendant pleaded an attachment made in London after imparlanee, and adjudged ill.

3 Leon. 232.

4. *What may be pleaded after a special Imparlanee.*

It is clearly agreed that all pleas in abatement, unless to the jurisdiction, may be pleaded after a special imparlanee.

Vide the authorities, *ante*. [Where the defendant pleaded a misnomer in abatement after an imparlanee, which was entered thus: "And A B, who was arrested by the name of A C, comes, &c.," the court held this to be tantamount to a special imparlanee. *Brewster v. Capper*, 1 Wils. 261; 1 Black. R. 51, S. C. But this resolution hath been overruled in a later case. See *Doughty v. Lascelles*, 4 Term R. 520.]

But it hath been doubted whether privilege could be pleaded after a special imparlanee, because it is neither an objection to the writ, bill, or count; but it seems to be now settled (c) that it may be pleaded after a special imparlanee, inasmuch as it does not oust the court of their jurisdiction, but is a privilege which each court allows to the officers of another to be sued in their own court.

2 Roll. R. 244; Sid. 29; 2 Show. 145, pl. 124. (c) Hard. 365.



## (C) Of Imparlanee.

An action of assault and battery was brought against one of the members of the university of Cambridge, and a general imparlanee given from one term to another. The Chancellor of the university comes and claims cognisance of pleas by virtue of a charter in Queen Elizabeth's time, whereby *cognitio placitorum*, with exclusive words *non alibi, &c.*, was given to the court of the vice-chancellor to proceed *secundum legem et consuetudinem universitatis*, in all cases where any of the body of that university should be defendant, which charter was confirmed by act of parliament, of which they produced a copy; and whether this claim, being made after imparlanee, should be received, was the question? and adjudged that it should not: and herein the court held, that, though the crown might grant conusances, yet it could not grant them with power to proceed by any other law than the common law; that as it was necessary to plead this privilege, so there was the like necessity to plead it according to the rules of law, which must be before a general imparlanee.

Lutw. 46; Gilb. Hist. C. P. 185; 10 Mod. 125; Case of the University of Cambridge, 2 Wils. 406, S. P.

On a plea to the jurisdiction on special privileges, it is usual to grant a special imparlanee; as in the common case of conusance, &c., for Oxford, &c., but they cannot imparl generally.

Comb. 68.

5. *In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlanee.*

It is said, that where the cause is by original, it is a favour of the court whether they shall have an imparlanee or not.

Skin. 2, pl. 2, vide *suprà*.

Also it is said, that on a special *capias* in C. B., the defendant shall plead the same term (especially if it be an issuable term) the writ is returnable, without any imparlanee, because the whole case is set forth in the writ; and an imparlanee being only the better to inform himself of the cause of action in order to his defence, there is no occasion for it when he is sufficiently informed thereof by the special *capias*.

2 Show. 145, pl. 124; Lil. Reg. 43.

Want of an imparlanee where allowable, if prayed, is error: *Secus*, if not prayed.

Comb. 13.

A second imparlanee was moved for in a *quo warranto*, and said to have been granted in the case of the city of London, but the court denied it; for Astry said, that by the course of the court they were to have but the common imparlanee; and the court said, that being *ex gratia* they may grant or deny it as they please.

Comb. 12.

If a man plead by force of an indenture which is lost, and affidavit made thereof, the party shall be compelled by the court to show his counter-part, and he to plead thereto, otherwise the court (a) may grant an imparlanee.

Cro. Ja. 429. (a) The court would not grant the defendant an imparlanee, though he was sued upon a bond of twenty-eight years' old, and could not see the bond, but bid him pray oyer of it, and plead, for the antiquity of the bond is no cause of imparlanee. 2 Lil. Reg. 42.

## (C) Of Imparlanee.

It is said that no imparlanee is allowed in a *homine replegiando*, or in an assize, unless upon good cause shown; because it is *festinum remedium*.

3 Salk. 186; Ld. Raym. 285.

A, bound by recognisance to appear and answer to an information, appeared and prayed an imparlanee; the attorney-general said an imparlanee is not to be denied, but asked how long he shall be allowed: and *per cur.* an imparlanee is a reasonable time to advise; and these have been from one return-day to another, but now they are always from one term to another in the Crown-office; but by Holt, C. J.—It seems reasonable that the defendant should have the same time on such appearance as if he had stood out, and come in upon attachment or *capias*, viz. the same time that the length of the process would take up, and no more; for when he had come in upon that, he must plead *instantly*.

Salk. 397, pl. 3; 6 Mod. 243, S. C., The Queen v. Rawlins; and vide 3 Mod. 315; Comb. 3.

Heretofore when one came in upon a recognisance or *habeas corpus* he was put to plead *instantly*, which was thought hard, and is therefore now redressed.

6 Mod. 243, *per* Northey *arguendo*.

In an appeal of murder the appellant cannot imparl, but the court may adjourn it by a *dies datus* till such a day.

Sid. 325. On an amendment defendant shall have an imparlanee or costs, at his election. Lechill v. Reynell, 2 Stra. 950. — In action for words defendant shall have imparlanee on affidavit of plaintiff's being under prosecution for the offence. Barnes, 224. — If defendant is lunatic there shall be imparlanee. Barnes, 225. — It shall be granted, though writ returnable on first return, if declaration was not delivered with notice to plead. Barnes, 225. — If plaintiff has a rule to file a bill to warrant proceedings he may enter imparlanee on roll; but if not entered in time he pays costs. Barnes, 227. — If notice of declaration is served on Sunday, imparlanee shall be granted. Barnes, 309. — If *habeas corpus* removes a cause from sheriff's court to B. R. November 6, and declaration is delivered November 12, and rule to plead given, the court will not grant imparlanee. Wood v. Wenman, 1 Wils. 154. — On process returnable the first, second, or third return of any term, if declaration is delivered within four days before the end of the term, defendant shall plead without imparlanee. General Rule C. B. Trin. 8 G. 3, 2 Wils. 381, [which is now extended to the fourth return of Easter term. Tidd, 478. (7th ed.)] — Not in real actions. Barnes, 2. — Not after a peremptory rule to plead. Barnes, 225. — Nor if notice to plead has been served, though not endorsed on the declaration. Barnes, 226, 227. [In K. B. it is now settled, that in all cases where the defendant has appeared and filed common bail, or perfected special bail, or plaintiff has appeared and filed bail for him, and the declaration is delivered or filed, and notice given four days *exclusive* before the end of the term in which the writ is returnable, the defendant must plead without an imparlanee. Tidd's Prac. 476, (7th ed.) But where the process is returnable on or after the last return, or where the plaintiff has neglected to deliver or file and give notice of declaration four days before the end of the term whereof the writ is returnable, defendant has an imparlanee to the next term. But if a writ be returnable the last day of one term, and the defendant do not justify bail until the fourth day of the next, he is not entitled to an imparlanee to the third term; for there is no laches in the plaintiff's not declaring until the defendant is fully in court. So also where a writ is sued out against two defendants jointly, and one of them cannot be met with before the return, so that it is necessary to sue out another, neither of the defendants are entitled to an imparlanee, by reason of the plaintiff's not declaring till the term in which the latter defendant is arrested or served; for he could not declare till both defendants were in court. Tidd's Prac. 479, (7th ed.) and the cases there cited. So where the defendant occasions the plaintiff's delay in declaring, he is not entitled to an imparlanee, as by unnecessarily obtaining an order for particulars with a stay of proceedings until they have been delivered. 2 Barn. & A. 320; and vide Tidd, 479.]

(D) Of making Defence: And herein, of the Difference between full and half Defence.

DEFENCE cometh from the word *defendo*, so called from the manner of pleading, viz.: *venit et defendit*, and is twofold; 1st, Half defence, which is *venit et defendit, vim et injuriam*. 2dly, Full defence, viz.: *venit et defendit vim et injur., quando, &c.*

Co. Lit. 127 b.

Defence, says my Lord Coke, is what the defendant ought to make immediately after the count or declaration; and in real actions is thus, *Et prædict. B venit et defendit jus suum, &c.* In personal actions it is thus, *Et prædict. B venit et defendit vim et injuriam, quando, &c., Et damna et quicquid quod ipse defendere debet*. By the second part of the defence, *et damna, &c.*, he affirms the plaintiff is able to sue and recover damages on just cause. If the defendant pleads in disability of the person, he must not make this part of the defence; as by the last part, viz.: "and all that which he ought to defend, when and where he ought," &c., he affirms the jurisdiction of the court; and therefore this part must be omitted when he pleads to the jurisdiction.(a)

Co. Lit. 127 b; Lit. § 199; Brownl. 75. {Going no farther than "defending the force and injury, when, &c.," is not a full defence; but if the defendant goes on and says "and the damages and whatever he ought to defend, &c.," that amounts to a full defence. In general, the &c. will imply only the half defence in cases where such a defence is to be made, and will be understood as making a full defence if a full defence is necessary. Willes, 40, *Alexander v. Mawman*; 8 Term, 631, *Wilkes v. Williams*.} (a) Defence, in its true legal sense, as defined by Mr. Justice Blackstone, signifies not a justification, protection, or guard, which is now its popular signification, but merely an *opposing or denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians: A general assertion that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. Vide Black. Com. 3 v. 296, &c.

|| But it is proper to commence a plea to the jurisdiction by *venit et defendit vim et injuriam, quando, &c.*, and the &c. shall imply half defence in cases where half defence is necessary, and full defence where there ought to be full defence. But if the defendant goes on to state at length *et damna et quicquid quod ipse defendere debet*, in that case he cannot afterwards plead in abatement.

*Alexander v. Newman*, Willes, 41; *Wilkes v. Williams*, 8 Term R. 631; 2 Saund. 209 c. ||

Defence also, says Lord Coke, is so necessary in all cases, that though the defendant appear and plead a sufficient bar without making defence, judgment shall be given against him.

Co. Lit. 127 b.

And therefore, where in debt on an obligation the defendant *venit et dicit*, that the plaintiff was excommunicated, &c., without making defence, &c., it was adjudged ill, and a *respondeas ouster* awarded.

3 Lev. 240, *Hampson v. Bill*.

But though this be a general rule, and though the *venit* is the record of the defendant's coming into court, and is necessary to make him a party, yet it hath been held, that the *defend. vim et injur.* were not (b) used in *clausum fregit* and assaults, and that therefore the want of them in those cases is not fatal, though shown for special cause.

Lutw. 9. (b) As appears in the old Book of Entries, fol. 5, 13, 30.

Also, where a plea to the jurisdiction was offered in an inferior court,

(E) The several Pleas. (*Pleas to the Jurisdiction.*)

without making defence, it was resolved not to be necessary where the court have no jurisdiction of the *matter*; otherwise, where not of the *person*.

Vent. 334.

So where an attorney of C. B. was sued in B. R. in action *qui tam*, for exercising the office of under-sheriff longer than one year, and he *venit et* pleaded his privilege, and held good without defence.

Salk. 30; Comb. 319, S. C., Kirkman v. Wheeler, Ld. Raym. 27.

In ejectment the defendant *venit et dicit* that the land is ancient demesne, without making defence; the plaintiff demurred specially; and it was resolved that the plaintiff may refuse the plea for want of defence; but that if he receives the plea, he admits a defence; as, if one pleads outlawry, he ought to plead it *sub pede sigilli*, and if he does not so plead it, the plaintiff may refuse it; but if he accept the plea he shall not demur for that cause, for it is well enough if he allow it.

Salk. 217, Ferris v. Miller; Carth. 220, 221, S. C. adjudged; and that being a plea to the jurisdiction, it is good without *defendit vim et injuriam*, and that most of the precedents were so. 3 Lev. 182, North v. Hoyle, S. P. resolved, and said, that the precedents were both ways.

Defence is never made in a *scire facias*.

3 Lev. 182.

## (E) The several Kinds of Pleas: And herein,

1. *Of Pleas to the Jurisdiction: And therein,*

1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction, and a Claim of Conusance.

HERE it will be necessary to observe, that the courts of Westminster are the superior courts of the kingdom, and have a superintendency over all the other courts by prohibitions, if they exceed their jurisdiction, or writs of error and false judgment, if their proceedings are erroneous, and have conusance of all transitory actions, except between the scholars of Oxford and Cambridge; and every thing is supposed to be done within their jurisdiction, unless the contrary appears; but, on the other hand, nothing shall be intended within the jurisdiction of an inferior court but what is expressly alleged to be so. Also, such inferior courts being bounded in their original creation to causes arising within the limits of their jurisdiction, if a debtor, who has contracted a debt out of such limited jurisdiction, comes within it, yet they cannot sue for such debt; and if any such action be brought, the defendant may plead to the jurisdiction.

Gilb. Hist. C. P. 188, 189. See tit. *Courts*, letter (D)

But there is a distinction, which is now fully established, between the counties palatine and other inferior courts, in this last respect; for a county palatine is a general court for all the subjects of the palatinate, and not merely for the causes arising within that palatinate; so that if a debtor goes from a foreign country into a palatinate, his obligations go along with him as much as if he went from one kingdom into another; and if it were otherwise, a palatinate jurisdiction would be a shelter and *asylum* to debtors, for no process but the supreme prerogative process runs there; and therefore it hath been determined, that though the cause of action be out of the palatinate, yet if the party be a subject of that palatinate, as he is by coming into that dominion, that the action may be brought against him there.

Sand. 74; Sid. 331; Peacock v. Bell, Gilb. Hist. C. P. 189, 190.

In all actions transitory, the superior courts have a jurisdiction, unless the plaintiff by his declaration shows that the action accrued within a county

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palatine; or, if it be between the scholars of Oxford and Cambridge, in which case the university shall have consuance; because by their charter, confirmed by act of parliament, they have jurisdiction over the persons of their scholars. But, though an inferior court might have determined it, yet the superior court, being once possessed of the action, cannot be hindered from proceeding.

4 Co. 213; Sid. 103. [As to claims of consuance, vide tit. *Universities.*]

In local actions inferior courts have a jurisdiction; but here a difference must be observed as to the manner of claiming it; for as to the principal courts of this kind, and into which *brevia domina regis non currant*, as the counties palatine, (a) they may plead their jurisdiction when intrenched upon by the superior courts; but where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at Westminster intrench on their privileges, they must demand consuance; that is, desire that the cause may be determined before them, for the defendant cannot plead it to the jurisdiction. And the reason is, because when a defendant is arrested by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally convened, and therefore may plead it to the jurisdiction; but the creating a new franchise does not hinder the writ from being made out as before, nor the courts above from having the same jurisdiction over the cause, but grants jurisdiction to the lord of the liberty; and whenever the king's courts intrench on his jurisdiction, he may make his claim, and demand that the cause may be determined before him.

4 Inst. 224; Roll. Abr. 489; Hard. 509. (a) So, ancient demesne, or held of the king's manor, may be pleaded. *Herne's Pleader*, 7, 351; *Hans*. 103; *Tho.* 2; *Rast.* 419.—So may the jurisdiction of the cinque ports. 4 Inst. 234. But vide *Carth.* 109, *et quære*; for it is there said to be such a franchise as Ely, and there resolved, that Ely, being no county palatine, but only a royal franchise, the defendant cannot plead to the jurisdiction of a superior court, but must demand consuance.

If the plaintiff in his declaration shows that the action accrued in a county palatine, the defendant cannot take advantage of it in arrest of judgment, nor can he take advantage of it by way of demurrer, but must plead to the jurisdiction of the court. And here note, that wherever the defendant can plead to the jurisdiction of the courts at Westminster, there the franchise may demand consuance, but not *vice versa*.

*Carth.* 11, 354.

Also in such cases, as the defendant may plead to the jurisdiction of the courts of Westminster, leave must be obtained from the court for that purpose; (b) as was done in an ejectment brought in B. R. for lands in the county palatine of Lancaster.

*Pasch.* 5 G. 2, in B. R., *Jones v. Hammond*; *Andr.* 368. (b) So, *Trin.* 3 & 4 G. 2, in B. R., *Trustant v. Brocklehurst*, on the demise of Lady Lawley, leave was given to plead to the jurisdiction for lands lying in Cheshire. *Barnard.* K. B. 352, 365.

As to pleading to the jurisdiction of an inferior court, herein we must again take notice, that inferior courts are bounded in their original creation to causes arising within such limited jurisdiction; so that if an action is brought on a promise in a court below, not only the promise but the consideration must be alleged to arise within its jurisdiction; for a debtor who has contracted a debt does not, by coming into the limits of such jurisdiction, give such court authority to hold plea thereof; nor is it sufficient to allege the cause of action within the jurisdiction of the court, but it must be proved

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on the trial; and if the plaintiff proves a consideration out of the jurisdiction, it cannot be given in evidence; and if it is, the defendant's counsel may tender a bill of exceptions; and upon such bill of exceptions the judgment will appear to be erroneous.

2 Inst. 231; Roll. Abr. 545, 546; Gilb. Hist. C. P. 188, 189; §1 Term R. 151.]

As in an action in an inferior court for calling the plaintiff whore, by which she lost her marriage, it was adjudged that the loss of the marriage should be laid within the jurisdiction, the words not being actionable without special damage.

Raym. 63; Lev. 69; Sid. 85.—And Salk. 404, pl. 1 S. P. adjudged, the loss of the marriage being held to be the gist of the action.

So if in the marshal's court the plaintiff declares, that in consideration the plaintiff, at the request of the defendant, had taken pains to procure him a lease of a house in Holborn, the defendant *apud S. infra jur.*, &c., promised to pay him 10*l.* &c., this is not sufficient to entitle the court to a jurisdiction, inasmuch as it does not appear that Holborn, where the house stands, is within the jurisdiction; and the jury are not only to try the promise, but the consideration also.

Lev. 50; Sid. 65, Ramsey v. Atkinson.

So in an *indebitatus assumpsit* for money for a cow sold, it must appear that the sale was within the jurisdiction; for the being indebted there does not necessarily imply that the sale was there, for he that is indebted in one place is so in every place.

Sid. 87; Lev. 96.

So in debt for rent upon a lease made *infra jur.* of an inferior court, it must appear also that the lands lie within the jurisdiction; for if part of the cause arises within the inferior jurisdiction, and part without, the inferior court ought not to hold plea.

Lev. 104; Sid. 151; Vent. 2, S. C., Drake v. Beare.

But if that which is only inducement, or matter of aggravation, be alleged to be out of the inferior jurisdiction, this will not oust such inferior court of its jurisdiction; as if in the court of H the plaintiff declares that he lent his horse at H for the defendant to ride to B, and that the defendant assumed at H to re-deliver him, this is well enough; for it is not the riding but the re-delivery which is the cause of the action.

Sid. 151, 189; Vent. 72.

So where in case the plaintiff declared in the court of *Bath in com. Somerset*, that he was a tailor, and that he used the said art for several persons inhabiting *tam infra civitat. predict. quam alibi infra regnum Angliæ*, and the defendant, to scandalize him in his said art, said these words of him, *Thou hast stole as much cloth out of my suit and cloak which thou madest for me as did make thy wife a waistcoat*, by which he lost his customers; it was holden, that the action lies in that court, notwithstanding the allegation, *quam alibi infra regnum Angliæ*, for that is only matter in aggravation of damages.

Cro. Car. 570; Jon. 450; Roll. Abr. 546, S. C., Howell v. Ireland.

So in a writ of error of a judgment in the palace-court in an action on the case, wherein the plaintiff declared, that such a day, in such a parish, in the county of Middlesex, he delivered to the defendant (being an innkeeper) a gelding safely to be kept in his inn, and that he suffered him to be taken out

(E) The several Pleas. (*Pleas to the Jurisdiction.*)

of his stable, and rid so immoderately that the gelding was spoiled: it was objected in error, that the riding did not appear to be within the jurisdiction of the marshal's court. But *per cur.*—In actions in inferior courts it is necessary that every part of that which is the gist of the action should appear to be within their jurisdiction; otherwise, of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remain, as in this case; and therefore the judgment was affirmed.

Salk. 404, pl. 1; 6 Mod. 223, S. C., *Stannion v. Davies*, 2 Ld. Raym. 795.

¶ If a defendant justify as plaintiff in an inferior court, under process issued out of that court, it is necessary for him to allege that the cause of action arose within the jurisdiction of the inferior court, or the plaintiff may demur.

*Moravia v. Sloper*, Willes, 30; *Evans v. Munkley*, 4 Taunt. 48.

But in an action on the case for rescuing a party taken on mesne process, out of an inferior court, it is no ground for arresting the judgment, that the declaration does not state that the cause of action in the inferior court arose within the jurisdiction.

*Bentley v. Donnelly*, 8 Term R. 127; 1 Wils. 255.¶

The defendant, when sued in an inferior court for a matter not arising within its jurisdiction, must plead to the jurisdiction; and if such plea be refused, the courts above will grant an attachment.

Inst. 229, 230; Raym. 189; Mod. 81.

Also, it hath been (a) held, that if the defendant admits the jurisdiction of such inferior court, the courts above may grant (b) a prohibition; but in the case of (c) *Mendyke v. Stint*, it hath been adjudged, that after verdict and judgment no prohibition lies; but in this case it was said, that if any matter appears in the declaration which sheweth that the cause of action did not arise *infra jurisdictionem*, a prohibition may be granted at any time: so if the subject-matter of the declaration be not proper for the judgment and determination of that court; or if the defendant, who intended to plead to the jurisdiction, be prevented by any artifice, or by the attorney's refusing to plead it, or if his plea be not accepted, or be overruled; in all these cases a prohibition will lie at any time.

(a) F. N. B. 45, 46; 2 Roll. Abr. 317. (b) Where upon the statute Westm. 1, c. 35, a prohibition will be granted, vide Salk. 201, pl. 5, 202. (c) 2 Mod. 271, 272.

If in the county court, or other inferior court, they shall divide a debt of 20l. into several plaints, under 40s., in such case the defendant may plead the same to the jurisdiction of the court, or may have a prohibition to stay that indirect suit.

2 Inst. 312.

But it hath been held, that no action will lie for suing in a court that hath no jurisdiction of the matter. [But *quare*.]

Carth. 189, 190.

## 3. The Manner and Time of pleading to the Jurisdiction.

A plea to the jurisdiction is not properly a plea in abatement, though in its consequence it be so; and therefore is to have its proper conclusion; as, *respondere non debet*, or, *si curia cognoscere velit*, and not *quod billa cassetur*.

3 Mod. 145, 146; Carth. 363; Salk. 298, pl. 9.

According to the order of pleading, the defendant must first plead to the jurisdiction of the court, and this he must regularly do before imparlance;

## (F) Pleas in Abatement.

for by craving leave to imparl, he submits to the jurisdiction, except where ancient demesne is pleaded, which may be done after imparlance, because the lord might reverse the judgment by writ of disceit; and it goes in bar of the action itself in that court, because it is *coram non judice*.

2 H. 6, 30; 23 H. 6, 7; Doct. pl. 234; Hard. 365; Lutw. 46; Dyer, 210; Stile, 30; Latch. 83. {By the established practice in the courts both of Pennsylvania and of the United States, the court will put a stop to the proceedings in *any stage* on its being shown that they have no jurisdiction. It is not necessary that there should be a plea to the jurisdiction entered before imparlance. 1 Bin. 138, Mannhardt v. Soderstrom; Ibid. 219, Moore v. Wait; 2 Dall. 368, Ketland v. The Cassius; 3 Dall. 19, Bingham v. Cabot.}

The defendant must make (a) but half defence, for if he makes the full defence *quando*, &c., he submits to the jurisdiction, the &c. being *quando et ubi cur. consideraverit*.

Co. Lit. 197 b; Lutw. 9; Show. R. 386. (a) Where an inferior court hath no jurisdiction of the matter, it is not necessary to make any defence at all. Vent. 334.

The defendant must plead *in propria persona*, (b) for he cannot plead by attorney without leave of the court first had, which leave acknowledges their jurisdiction; for the attorney is an officer of the court, and if they put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court.

6 Mod. 146; that such plea must be put *in propria persona*, and whilst the court is sitting, and oath must be made of the truth thereof; but in Carth. 402, it is held, that a plea to the jurisdiction need not be on oath, as a foreign plea must.—No dilatory plea without affidavit. 4 Ann. c. 16, § 11. [(b) In these two points, viz. that they must be pleaded in person, and that in pleading them the defendant must make but half defence, pleas to the jurisdiction differ from pleas in abatement; for these may be pleaded by attorney, and with full defence. Lutw. 7; Wheatley v. Cudmerson, Mich. 15 G. 2, C. P.; Thompson v. Stockdale, Hil. 23 G. 3, K. B.]

He who pleads to the jurisdiction ought by his plea to give jurisdiction to some other court.

Rex v. Johnson, 6 East, R. 583. β In an action in Suffolk against the sheriff of Middlesex, for the supposed misfeasance of his deputy, in neglecting to attach the goods of A, upon a writ of attachment returnable at Suffolk, a plea to the jurisdiction of the court, alleging that "it lawfully appertains to the common pleas within and for the county of Middlesex to have jurisdiction," &c., is bad. Marshall v. Hoamer, 3 Mass. 23. See Rea v. Hayden, 3 Mass. 25.γ

|| Therefore, where the defendant, a judge of C. B. in Ireland, pleaded to an indictment for publishing a libel in Middlesex, that Ireland before and since the union was governed by its own laws, and not those of Great Britain, and that there always had been, and were courts and jurisdictions in Ireland distinct from those of Great Britain, and sufficient for the trial of all offences committed by the natives of Ireland, and that defendant was a native of Ireland and resident there at the time of the offence, and that the subject-matter related to things in Ireland, the plea was held ill on general demurrer, for the plea gave no jurisdiction where the trial of this offence could be had, and if the defence were at all available it was a complete bar to the charge of unlawfully publishing a libel in Middlesex, and ought to have been pleaded in bar or given in evidence on not guilty.||

See further on this subject, vol. i. 2. || tit. "ABATEMENT;" vol. ii. (D) 3, tit. "COURTS."||

## . (F) Of Pleas in Abatement.

See tit. "ABATEMENT."



(G) Of Pleas in Bar and in Chief: And herein,

1. *Of the General Issue, and how formed.*

ISSUE is thus defined by my Lord Coke, a single, certain, and material point issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly of an affirmative and negative, to be tried by twelve men; and is either general or special.

Co. Lit. 126.

The general issues were contrived in such words as were most proper to deny the whole fact in the declaration; as, in a charge of trespass, the general issue is (a) not guilty; in debt, that he owes nothing; (b) if the action is grounded on a specialty, *non est factum*, or that it is not his deed; for the debt being grounded on a specialty, he admits the debt, unless he denies the deed; for the seal continuing, it must be dissolved *eo ligamine quo ligatur*.

(a) That not guilty is a good plea to any misfeasance whatsoever, Cro. Eliz. 257; 3 Mod. 324; Skin. 280. [*Riens in arriere* is a good plea to an action of debt for rent; it is the general issue. *Secus*, to an action of *covenant*, because it confesses the covenant to be broken, and tends but in mitigation of damages. Warner v. Theobald, Cowp. 588; Hare v. Saville, 1 Brownl. 19. *Nil debet* is also a good plea to debt for rent. Hardr. 332; 2 Ld. Raym. 1503; Bull. N. P. 170.] (b) Cro. Ja. 377, 531, to an usurious bond or sheriff's bond *non est factum* cannot be pleaded, but must be avoided by special pleading. Hob. 72; and vide titles *Sheriff* and *Usury*.

An issue being taken generally referreth to the count, and not to the writ; as, in account, the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of T. The defendant pleadeth, that he was never his receiver in manner and form, &c.; this shall refer to the count, so as he cannot be charged but by the receipt by the hands of T.

Co. Lit. 126 a.

An issue shall not be taken on a negative pregnant, which implieth another sufficient matter; but upon that which is single and simple, as *ne dona pas per le fait* implies a gift by parol, and therefore the issue must be *ne dona pas modo et forma*.

Co. Lit. 126 a.

Some issues be good upon matter affirmative and negative, albeit the affirmative and negative be not in precise words; (c) as in debt for rent upon a lease for years, the defendant pleads that the plaintiff had nothing at the time of the lease made; the plaintiff replieth, that he was seised in fee, &c.; this is a good issue.

Co. Lit. 126 a. [(c) Of necessity, an issue may be joined on two affirmatives. Co. Lit. 126 a; Bro. Issue, 28. So, if issue be tendered by an affirmative, and the other join, it is good, though there was not a negative. As, if an executor plead, *no assets*, and the plaintiff reply that he purchased another writ, and then he had assets, and tender an issue thereon, and the defendant join, it is good. Aldrich v. Welthall, Cro. Ja. 580, 589. So, to debt upon bond, the defendant pleaded, duress of imprisonment; to which the plaintiff replied, that the defendant was at large, and at his own disposal, and executed the bond of his free will, and not for fear of imprisonment, and concluded to the country. To this there was a demurrer, and judgment given for the plaintiff, which judgment was affirmed in error. For *per curiam*—This is such an affirmative as implies a negative; like the case of pleading in a writ of right, where the demandant counts that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative hath been long broken into, as in the common case of infancy, where formerly they not only replied full age but also traversed the infancy, which is not now required. Sir T. Jones, 6. It is enough, if the second affirmative is so contrary to the first that the first cannot in any degree be true. Tomlin v. Purvis, 2 Stra. 1177; 1 Wils. 6, S. C.

(G) Pleas in Bar. (*General Issue.*)

However, in Sav. 86, it is said, that where there are two affirmatives, one of which implies a negative of the other, the issue cannot be properly joined upon them without a traverse:] [and vide 6 East, 557; Arch. Plead. 174, 175; 1 Saund. 22, n. 2, 208, 209.]

Where the issue is joined of the part of the defendant, the entry is *et de hoc ponit se super patriam*; but if it be of the part of the plaintiff, the entry is *et hoc petit quod inquiratur per patriam*.

Co. Lit. 126 a; 33 H. 6, 21.

There be some negative pleas which be issues of themselves, whereunto the demandant or plaintiff cannot (a) reply, any more than to a general issue, which is *et prædictus A similiter*; as if the tenant do vouch, and the demandant counterplead, that the vouchee or any of his ancestors had any thing, &c., whereof he might make a feoffment, he shall conclude, *et hoc petit quod inquiratur per patriam et prædictus tenens similiter*; so in a fine pleaded by the tenant, &c., the demandant may say, *quod partes finis nihil habuerunt, et hoc petit quod inquir. et prædict. tenens similiter*: and so in a writ of dower, the tenant pleads, *ne unques seisi que dower*, he shall conclude, *et de hoc ponit se super patriam et prædict. petens similiter*.

Co. Lit. 126 a. (a) The reason is, that it would be inconvenient to go on to a replication, because to reply generally would leave it too large and comprehensive, and to reply any particular kind of estate would be too narrow, and consequently immaterial. 1 P. Wms. 259.

Every issue consists of an (b) affirmative and negative; and an issue being once well tendered must be accepted, and closes the pleadings.

Co. Lit. 126; Sand. 338; Lutw. 623, 1130; Comb. 86. (b) A distinction was thus taken by counsel, viz.: that where an affirmative came after a negative, there, issue ought not to be joined, but ought to be left on the other side; but, where the affirmative was first and the negative came after, there it ought to be joined. But Holt, C. J., said he had never heard of this distinction, and therefore gave but little regard to it. Carth. 88.

In an *audita querela*, to avoid the execution of a recognisance, the plaintiff set forth, that it was defeasanced upon payment of divers sums of money at certain days, and that he was at the place appointed and tendered the money, and that the defendant was not there to receive it; the defendant pleaded (c) *protestando*, that the plaintiff was not there to pay it, and that he was there ready to receive it, *absque hoc*, that the plaintiff was ready to pay it; which being specially demurred to, the court held the plea naught; and that there being an express affirmative and negative, there should have been no traverse; for so they may traverse one upon another *ad infinitum*.

Cro. Eliz. 754, 755, Huish v. Phillips. (c) A protestation availeth not the party that taketh it if the issue be found against him; and therefore, if the issue be found for a villein, he is enfranchised for ever; and yet in some special cases, albeit the issue be found against him that maketh the protestation, yet he shall take benefit of his protestation; as, if a man entereth into warranty, and taketh by protestation the value of the land, albeit the plea be found against him, yet the protestation shall serve him for the value. Co. Lit. 126 a. [Where the matter cannot be pleaded, it shall be saved to the party protesting, though the issue be found against him; as, where an infant sues his guardian for waste, and appears by attorney, and the guardian takes the nonage by *protestando*, it shall save him the wardship, for he cannot plead it. 2 Saund. 104, note.]

The reason of joining issue is, that the party may come prepared to defend one single point; which holds in all cases, except in barratry; and even in that, notice must be given of the point the prosecutor intends to proceed on.

Lucas's Rep. 299, vide tit. *Barratry*.

(G) Pleas in Bar. (*General Issue.*)

In an action of false imprisonment, the defendant justifies by force of a *latitat* out of B. R., by force of which he took him; the plaintiff replies, that he did it *de injuriâ suâ propriâ*, &c. It was moved that this was naught after a verdict, and not helped; but the court held it well after a verdict; but that upon demurrer it would be naught, as being multifarious, jumbling matters of record and matters of fact together.

Raym. 50; Keb. 125, 164, Beesly v. Walker. [As to the replication *de injuriâ*, &c., vide tit. *Trespass*, (I).]

An action of debt was brought upon a recovery in the court of Norwich; the defendant shows that the court is holden by custom before other persons, *absque hoc*, that the plaintiff such a day recovered *secundum consuetudinem*, &c., upon which it was demurred; and in defence of the plea it was said, that it is not the record that is put in issue, but the custom only, and that may well be traversed; for which were cited Hob. 244, Hutt. 22, 1 R. 3, 9. But the whole court held the plea pregnant and insufficient; for he has made the day parcel of the issue, which he ought not to have done, but have said only (a) *modo et formâ*; and they held clearly, that the custom to hold courts might well have been traversed, if that point had been singly brought into issue; but here matter of record is mixed with matter of fact, which is ill on a general demurrer; and therefore judgment was given for the plaintiff.

Lev. 193; Sid. 302; 2 Keb. 107, 122, S. C., Dring v. Repass. (a) Where *modo et formâ* are of the substance of the issue, and where but words of form, this diversity is to be observed; where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of form; but otherwise it is where a collateral point in pleading traversed, as if a feoffment be alleged by two, and this be traversed *modo et formâ*, and it be found the feoffment of one, there *modo et formâ* is material; so if a feoffment be pleaded by deed, and it be traversed *absque hoc, quod feoffavit modo et formâ*, upon this collateral issue *modo et formâ* are so essential that a jury cannot find a feoffment without deed. Co. Lit. 281 b.

[The plaintiff declared upon two bills of exchange, and several other promises; the defendant, as to the two first counts upon the bills of exchange, pleaded, *quod actio non accrevit infra sex annos*, and as to the other counts *non assumpsit* generally. The plaintiff replied, that upon such a day he sued out a *latitat*, which he continued down to the present declaration, and averred, that the cause of action arose within six years before the suing out of the *latitat*. The defendant in his rejoinder *protesting* that there was no such writ issued as set out by the plaintiff, for plea said, that after the six years were expired, viz.: such a day, the plaintiff first sued out a *latitat*, which he set forth, and that he appeared to it; and that the plaintiff declared upon it, as above, and traversed that he appeared and put in bail to the writ mentioned in the replication, and concluded with an averment. The plaintiff demurred, and showed for cause that the rejoinder is contrary to the record of appearance, and a negative pregnant. The plaintiff had judgment.

Crokatt v. Jones, 2 Stra. 734; 2 Ld. Raym. 1441.

An issue ought to be upon a point, which may be well tried. Thus, if it be alleged that a woman was *enseint* by her husband at the time of his death, the issue must be, if she was *enseint*, not if *enseint* by her husband, for *filialio non potest probari*.

Co. Lit. 126 a.]

¶ *Nil debet* is the safest plea in debt for a penalty.

Sulson v. Toby, 1 Mass. 522.

Not guilty may be pleaded to a declaration containing a count on a war-

(G) Pleas in Bar. (*Immaterial and informal Issues.*)

ranty on a sale, and a count on assumpsit, both arising out of the same transaction.

Hollock v. Powell, 2 Caines, R. 216.

The plea of *non est factum* merely puts the deed in issue; and the plaintiff need not prove the other averments in his declaration.

Gardner v. Gardner, 10 Johns. 47.g

### 2. *Immaterial and informal Issues, and where aided.*

Here the general rule is that where the issue is immaterial a verdict will not aid it; but where it is only informal, it is helped.

Vide tit. *Amendment*; ¶ and vide post, *Repleader*, (M).¶

An immaterial issue is, where what is immaterially alleged by the pleadings is not traversed, but an issue taken upon such a point as will not determine the merits of the cause: an informal issue is, where it is not traversed in a right manner.

Carth. 571; Lev. 32. A When a good defence is defectively stated, if the replication be general, and there be a verdict upon this issue, the defect will be cured. Barlow v. Wiley, 3 Marsh. 460. As to immaterial pleadings, see Dewey v. Humphrey, 5 Pick. 187; Freeland v. Ruggles, 7 Mass. 511; Johnson v. Kirtledge, 17 Mass. 76; Hapgood v. Houghton, 8 Pick. 451; Dyer v. Stevens, 6 Mass. 389; Daws v. Winship, 16 Mass. 291; Eames v. Savage, 14 Mass. 425; Flagg v. Thurston, 11 Pick. 431; Rixford v. Wait, 11 Pick. 339; Hale v. Dennie, 4 Pick. 501.g

A verdict cannot help an immaterial issue, because what is alleged in the pleadings is not put in issue; or, if it be, it is not decisive between the parties, and so the verdict is no good foundation for the judgment; and if what is material in the pleadings be not put in issue, it is not made necessary to be proved on what trial; but if it be not decisive, then what is necessary to be proved on the trial will not in all cases be a foundation for the judgment: for the courts in these cases are judges on what point they ought to go to issue, so as to be a legal charge by the plaintiff, or discharge by the defendant; since it is the province of the judges to settle the matter of law, and the jury the matter of fact.

Cro. Eliz. 227; Brownl. 229; Camh. 371; 2 Roll. R. 117; Cro. Ja. 580.

If the plaintiff declares upon a promise to find the plaintiff, his wife and two servants, with meat and drink for three years, upon request; and the defendant pleads, that he promised to find the plaintiff and his wife with meat, &c., *absque hoc*, that he promised to find, &c., for two servants, &c., and the plaintiff replies, that he did promise to find, &c., for three years next following, *et hoc petit*, &c., and thereupon a verdict is found for the plaintiff; yet he shall not have judgment; for the promise in the replication is not the same as that in the declaration, which was traversed by the defendant; and so there is no issue joined, and therefore is not helped by the statute.

3 Leon. 66, Kirbee v. Leirs; 2 Leon. 195, S. C. cited; Godb. 56, S. C. cited.

If in debt on a bond conditioned for the payment of 105*l.* at a certain day and place, the defendant pleads, that at the day and place he paid *prædict.* 100*l.* *quas solvisse debuit secundum formam et effectum conditionis*; and the plaintiff replies, *Quod non solvit prædict.* 105*l.*, &c., and a verdict is found *quod non solvit* the said 105*l.*; yet the plaintiff shall not have judgment; for *prædict.* 100*l.* shall not be intended the 105*l.*, and so they meet not, and there is no issue.

Cro. Ja. 525, Sandbank v. Turvy; Hob. 113; Cro. Car. 593; S. P. adjudged.

(G) Pleas in Bar. (*Immaterial and informal Issues.*)

¶ So in debt on bond conditioned for performance of several covenants, the defendant pleaded first a general performance, and then a separate performance of each of the covenants, and the plaintiff took issue only on the general performance, and then suggested various breaches, and the defendant joined in this issue; the issue was held immaterial and a repleader awarded; for the plaintiff ought, in his replication, to have assigned specific breaches in answer to the defendant's plea of special performance, and the defendant should have demurred to the replication for not doing so; but as the defendant had joined in the issue the issue was immaterial.

Plomer v. Ross, 5 Taunt. 368.¶

If in a *sci. fa.* upon a judgment against the administratrix of J S, the defendant pleads, that the said J S made B within age his executor, and that administration *durante minore etate* of the said B was committed to the defendant, and that such a day the said B attained the age of seventeen, and then refused to be executor, &c., and that when the said B attained his said age the defendant had fully administered, &c., and the plaintiff replies, that at the time the said B came to his said age *devastavit diversa bona*, &c., and the defendant rejoins, *Quod ipse non devastavit*, &c., and thereupon issue be joined, and found for the defendant; she shall have judgment; for the devastation must be intended by the administratrix, and the plaintiff shall not avoid the verdict by an exception to his own replication.

Cro. Car. 79, 93, Oxford v. Rivit, adjudged by three judges against two, who held there was no issue, and so the verdict void and not aided by the statute of jeofails. Helt. 35; Lit. Rep. 52, S. C.

In trespass the defendant pleads an accord between the plaintiff and J S of the one part, and the defendant of the other part; the plaintiff replies, *Quod non habetur talis concordia* between the plaintiff and defendant *qualis* the defendant had alleged; and on issue joined a verdict for the plaintiff, yet he shall not have judgment; because the plaintiff does not traverse the same concord that is set out in the defendant's bar, but puts another concord in issue not alleged in the defendant's bar, between the plaintiff and defendant only, and the court cannot be certain which is proved on the trial; and though it may be said in this case, that either may bar the action, yet only one thing is to be put in issue; and if it should be otherwise, there would be no correspondence between the *probata* and *allegata*.

Roll. R. 86.

In debt on a bond conditioned for the payment of 8*l.* on a certain day, the defendant pleads payment on the day in the condition, *et de hoc ponit se super patriam, et predict.* the plaintiff *similiter*; and found for the plaintiff: here, the defendant has closed the issue on the plaintiff by the *hoc ponit se super patriam*; yet the defendant cannot take advantage of the informality of his own plea, and it is waived on both sides when they go to issue on the substance of it.

Cro. Car. 316, 317, Parker v. Taylor; Sid. 290, S. C. cited.

But, if in trespass the defendant pleads a special justification, and the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, there, though the issue is found for the plaintiff, it is wrong after verdict, because the *injuriâ suâ propriâ* does no more than affirm the declaration, and does not confess or deny the bar; and therefore the gist of the bar is not put in issue at all, but rather stands confessed by the replication since the cause is not traversed; for saying it was *de injuriâ suâ propriâ* is no more than saying, that notwithstanding the cause mentioned in the bar the defendant committed the injury,

(G) Pleas in Bar. (*Immaterial and informal Issues.*)

which the bar being a sufficient excuse cannot be; but it does not in the least put the bar in issue.

Sid. 341; Cro. Ja. 599, S. P. adjudged; Roll. R. 47, S. P. adjudged; Stile, 154, 198. Vide Hard. 40, S. P. cited Vent. 70, S. P. said to have been adjudged; 8 Co. 66.—The position in this paragraph is too general.—There are many cases where the general replication with the general traverse is sufficient. Many where it is not. *β* In trespass by a mariner against a mate for tying him up to the rigging by order of the master, for the purpose of punishment, the defendant pleaded that he was bound to obey the master's orders, and that he used no unnecessary violence in tying up the defendant. A replication *de injuriâ* was held proper as presenting a mixed question of law and fact. *Frost v. Hammatt*, 11 Pick. 70. *¶* Vide tit. *Trespass.*

*β* In an action of trespass, when the defendant by his plea admits the thing charged to have been trespass in its nature, but sets up certain concomitant circumstances which in law are an excuse or justification, the plaintiff may reply *de injuriâ suâ propriâ*, &c.; but when the defendant denies the thing charged, to have been a trespass at all, for that the close broken, and goods taken were the property of himself, or of another, by whose authority he acted, then the plaintiff cannot reply *de injuriâ*, &c.; but the replication must traverse the right or interest set up in the plea, or it will be bad.

*Berry v. Cahahan*, 2 Halst. 77. By the modern decisions in England, *de injuriâ* may be replied to an action of *assumpsit*, when the plea consists of matter of excuse; 3 C. M. & R. 65; 2 Bing. N. C. 579; 4 Dowl. 647. See 2 Lev. 65; 4 Tyrw. 777; Hob. 76; Sir T. Raym. 50; 5 B. & A. 420; 11 East, 451; 10 Bing. 157; 1 Bing. 317; 1 Bing. N. S. 387; 1 Smith's Lead. Cas. 53 to 61; 8 Co. 66; Bouv. L. D. *De Injuriâ*.

If in an *assumpsit* for wares sold the defendant pleads *quod tempore quo*, &c., he was an infant, and the plaintiff replies they were for necessities, *et hoc petit quod inquiratur per patriam*, &c., and thereupon issue is joined, and a verdict found for the plaintiff; though this traverse is informal, because the plaintiff ought not to have closed the issue, but to have given the defendant an opportunity of rejoining, that there might have been a proper negative to his affirmative; yet since the matter of the replication is put in issue, viz., whether they were necessities or not, the defendant has waived all objections to the form, and by such waiver it appears that he is not any ways injured by not rejoining, and it being found that they were necessities, the plaintiff ought to prevail.

Sid. 341, 342, *Burton v. Chapman*.

In debt on a bond conditioned for the payment of 60*l.* on the 25th of June, the defendant pleads payment on the 20th of June *secundum formam et effectum conditionis*, *et sur ceo* issue is joined, and the verdict finds *quod non solvit* 60*l.* at the 20th; the plaintiff shall not have judgment, for the issue is *dehors* the matter of the condition, and so void, and it might have been paid the 25th, though it was not paid the 20th, so that it does not appear the condition was broken. But where the issue is decisive between the parties, though it be not so apt, yet this shall be cured after a verdict.

Cro. Ja. 434, *Holmes v. Brocket*. *β* Vide as to what defects will be cured by a verdict the following cases, namely: *United States v. The Virgin*, 1 Pet. C. C. R. 9; *Carson v. Hood's executors*, 4 Dall. 108; *Welch v. Vanbebber*, 4 Yeates, 420; *Miles v. Oldfield*, 4 Yeates, 423; *Stoever v. Stoever*, 9 S. & R. 434; *Kerr v. Sharp*, 14 S. & R. 399; *Chesnut Hill Turnpike Co. v. Rutter*, 4 S. & R. 6; *Weigley v. Weir*, 7 S. & R. 309; *Shaw v. Redmond*, 11 S. & R. 27; *Kerr v. Sharp*, 14 S. & R. 399; *Hockley v. Fulmer*, 4 Yeates, 130; *Cavene v. M<sup>c</sup>Michael*, 8 S. & R. 441; *Good v. Harnish*, 13 S. & R. 99; *Carl v. Commonwealth*, 9 S. & R. 63; *Cotteral v. Cummings*, 6 S. & R. 348; *Crouse v. Miller*, 10 S. & R. 155; *Hamilton v. Frederick*, 4 Yeates, 129. *¶*

As in replevin the defendant avows that Ellen Enderby was seised in fee, and took Pigott to husband, and had issue by him Thomas; that Ellen and

(G) Pleas in Bar. (*Immaterial and informal Issues.*)

Thomas granted a rent-charge for which he distrains: the plaintiff replies, that one Fisher being seised in fee gave the land to J. Enderby in tail, who had issue Ellen; that J. Enderby died, and Ellen entered, and being seised in tail took Pigott to husband, and had issue Thomas, who is dead, who granted, &c., *absque hoc*, that Ellen was seised in fee; though this was an informal issue, for the plaintiff ought to have traversed that Thomas, the grantor, was seised in fee; yet it is a decisive issue, for it is allowed on both sides that Thomas was in by descent from Ellen; and if Ellen was seised in fee, Thomas was so too, and consequently had good right to make the grant.

Cro. Ja. 44; Yelv. 54, *Pigott v. Pigott*.

If in debt upon a single bill the defendant pleads payment, without an acquittance, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for the payment without an acquittance is no plea to a single bill; yet, because issue was joined upon an affirmative and negative, and verdict for the plaintiff, he shall have judgment: adjudged upon a writ of error in *Camera Scaccarii*, and the first judgment affirmed accordingly.

5 Co. 43, *Nichol's case*; Moor, 692, S. C.; Cro. Eliz. 455, S. C.; 3 Bulst. 301.

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it shall be aided by the statute; because being an ill plea, and a false one, the plaintiff ought to have his judgment, both for the badness of the plea and for its falsehood: but if the verdict had been for the defendant, yet the plaintiff should have judgment; because the declaration is not answered by the plea.

Noy, 56; Cro. Eliz. 773; 2 Jon. 134. [*Qu. Whether not guilty would not be a good plea in debt on a penal statute, as for not setting out tithes, usury, &c.?* 1 Term R. 462. Upon a *devastavit* against executors, not guilty may be pleaded as well as *nil debent*. Ibid.] But the plea of *non assumpsit* in debt is a nullity, and the court will only set aside a judgment signed, on the terms of defendant paying the costs. *Brennan v. Egan*, 4 Taunt. 164; 6 East, 549; and the plea of *nil debet* in *assumpsit* is a nullity. *Barnes*, 257; *Tidd*, 560, (9th ed.); 3 Dow. & Ry. 621; 1 Dow. & Ry. 473; 7 Dow. & Ry. 511.]

So, if in an *assumpsit* the defendant pleads not guilty, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though this is an improper issue (a) in this action, yet because there is a disceit alleged, not guilty is an answer thereto; and it is but an issue misjoined, which is aided by the statute.

Cro. Eliz. 470, *Corbyn v. Brown*; 2 Stra. 1022. The plea of "not guilty" in *assumpsit* cannot be treated as a nullity. 1 Chitt. R. 715; and see the cases in note. (a) Where in debt against an executor upon the bond of his testator the defendant pleaded *non est factum*. *Hard*. 458.

If in debt against A as executor of B, the defendant pleads that B died intestate, and that administration of his goods was committed to C, and the plaintiff replies that, before the said administration granted, divers goods, &c., came to the hands of the defendant, which, as executor to the said B, *administravit seu aliter ad usum suum proprium disposuit et convertit*, &c., and thereupon in the disjunctive issue is joined, and found for the plaintiff, he shall have judgment; (b) for the point in issue is directly found, and so it is within the statute; and this also is no improper issue; for whether he administered or converted to his own use, both must be as executor.

Hob. 49, *Keble v. Osbaston*. [(b) So, an issue, that gold was found in a ship passing or upon its passage from London to R, is good. *Hardr.* 17, 19. So that the cus-

(G) Pleas in Bar. (*Immateral and informal Issues.*)

some were not concealed or withheld. *Hardr. 17; Dyer, 43 b.* So that he paid or ceased to be paid. *Hardr. 19.* For an issue may be upon a disjunctive, where the words of the disjunctive proposition are synonymous.]

If in replevin the defendant avows for damage-*frasant*, and the plaintiff replies, that he was seized in fee of a messuage and certain land, and that JS was seized of another messuage and land, and that they two, and all those whose estate, &c., had common, &c., in the place where, &c., and conveys to himself the other messuage and lands for years, and so justifies, &c., and the defendant traverses the prescription, and it is found for the plaintiff; though the prescription thus confessed for several is grossly faulty, and (a) the issue thereupon confused, yet after verdict it was saved by the statute.

*Hob. 113.* (a) If in debt upon an obligation the defendant pleads the statute of *usury et quod corrupte accepit facti, &c., et quod quicquid corrupte recepit, the usury is taken upon both, and found for the defendant, he shall have judgment; though this issue is double, the one part material and the other not. Moor, 574, pl. 790.* If in debt for rent the defendant pleads *nil hab. in tenementis*, and the plaintiff replies *quod hab. locum et sufficientem statum, &c.*, but does not show what in particular, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though the issue is informal, yet the substance of the matter is found, viz., that he had an estate, &c. *Glan v. Gill, Yelv. 227; Cro. Ja. 312; and vide Bala. 241.*

If in an action of (b) covenant the plaintiff assigns a breach, that the defendant was not seized in fee, *et sic infregit conventionem*; and the defendant pleads *non infregit conventionem*, and thereupon issue is joined, and a verdict for the plaintiff, he shall have judgment; for this is but an informal issue. (c)

*Sid. 289; Lev. 183, Walsingham v. Comb.* (b) So, where the covenant is to repair, and the plaintiff assigns the breach, that the defendant suffered the houses to be ruinous, *et sic non reparavit*, and the defendant pleads that he did not suffer them to be ruinous. *Moor, 599; Cro. Eliz. 457; 2 Leon. 116.* [(c) But *non infregit conventionem* is clearly bad on demurrer where the declaration concludes, "and so defendant hath not kept his covenant," for it is then only a negative against a negative; and *seemeth* that in any case it is bad on demurrer. *8 Term R. 280; 2 Taunt. 278.*]

In an action of assault and battery, the defendant pleads, that the plaintiff neglected his service, *per quod moderatè castigavit*; the plaintiff replies, *quod non moderatè castigavit*; and the issue was found for the plaintiff: though this be an informal traverse, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse should have been *de injuriâ suâ propriâ absque tali causâ*, yet after verdict it is good; because the jury have ascertained that he did not beat him moderately.

*Sid. 444, Vent. 70; 2 Keb. 623.*

If an issue be on a point that is impossible in substance and nature of the thing, it is not cured by the verdict; but if it be only impossible in the manner and form of it, a verdict will cure it; for where the substance is impossible, no verdict can cure it, because it cannot make that true which cannot possibly be; but where it is only impossible in the manner of it, there the thing which is possible may be found to be or not, and the manner which is impossible totally rejected: (d) as if an action of assault and battery be brought, and the defendant justify by conveying to himself an estate by copy of a parcel of the manor of C whereof D is seized, and that the plaintiff came upon it, and that he laid his hands *molliter*; the plaintiff reply, and convey to himself an estate by copy of another parcel of the manor, and that D, lord of the manor, had for himself and tenants a way over the defendant's piece of land; issue is joined, and verdict for the plaintiff; this is a void prescrip-



(G) Pleas in Bar. (*Immaterial and informal Issues.*)

tion; for a copyholder, being originally but a tenant at will, could not prescribe at will but in the name of the lord for an easement; and for an easement out of the manor he could not prescribe in the lord's name, but must lay it by custom, as the *lex loci*; but being laid here by way of prescription, it is in its own nature void; and the verdict could not make that which was repugnant to the nature of the thing to be true or false, and by consequence could not help it.

(d) Hob. 112, 113; Moor, 867, *Tasker v. Salter*.

But in debt on a bond conditioned for the payment of 100*l.* on 31 September, if defendant pleads payment at the day, and it is found against him, the plaintiff shall have judgment; because the payment is what is material, and the day is impossible and altogether idle and void; for, not being paid before the end of that month, the obligation is absolute.

Cro. Car. 78; Jon. 140; Latch. 158; Noy, 85, *Purchase v. Jegon*.

[In an action upon a contract for stock, which was required by act of parliament to be registered before the 1st of November, 1721, the defendant pleaded that the contract was not registered before the 1st of November, 1720, *secundum formam stat.*; the plaintiff replied, it was registered before the 1st of November, 1720, *secundum formam stat.*; upon which they were at issue, and the plaintiff had a verdict. Upon motion in arrest of judgment, that this was an immaterial issue, the court held it well enough; the registering of the contract was the material part; and the time which was imperceptibly alleged may be rejected as surplusage.

Woolley v. Briscoe, 1 Stra. 454; 8 Mod. 173, S. C.

To debt upon bond the defendant pleaded, *plenè administravit*; the defendant replied, that the defendant had assets in his hands to satisfy the damages aforesaid, and thereupon issue was joined; and the jury found a verdict for the plaintiff. It was moved in arrest of judgment that this is an immaterial issue, for it ought to have been, whether the defendant had sufficient to satisfy the *debt and damages*. In answer, it was said, that the word *damages* is only surplusage, and by leaving it out the issue will be a sensible, material issue, viz., that the defendant had sufficient to satisfy, &c.; and of that opinion was the court.

Collet v. Masterman, 1 Wils. 258.]

If in trespass issue is taken, that the prebendary of A, and all his predecessors, &c., had used, time out of mind, to keep a shepherd, for the better keeping together their sheep feeding in the said pasture from the sheep of T, Earl of S, and the issue is found for the plaintiff accordingly; though it is senseless and impossible that the sheep of the prebendary, &c., time out of mind could be kept from the sheep of the Earl of S, being but one man's life, yet the plaintiff shall have judgment; for the substance of the issue is the keeping the sheep of the prebendary, &c., and the other part is but a consequence thereof, that thereby they were kept from the sheep of the said earl.

Hob. 117, *Napper v. Jasper*.

In debt upon a bond against an administrator brought in Hilary term 22 Jac., the defendant imparled: and in Easter term 1 Car. the defendant pleaded a judgment upon a bond, dated *anno quinto regis nunc*, where it should have been *regis Jac.*, and that he had not assets *ultra* to satisfy that judgment; and thereupon the plaintiff joined issue, that the said recovery was by fraud and covin; and it was found for the plaintiff; though it was

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impossible there could be a bond *anno quinto regis Caroli*, which was not then come, yet the plaintiff, having a good declaration, had judgment.

Cro. Car. 25, Knight v. Harvey.

In covenant on a conveyance of lands, the vendor covenants that he was seised in fee, and assigns a breach that he was not seised in fee, and so had not performed his covenant; the defendant pleads, that he had not broken his covenant; and on the issue so joined, a verdict was for the plaintiff: it was moved in arrest of judgment, that this was not any issue, it consisting only of two negatives, viz., that he was not seised in fee, and so had not performed his covenant on the plaintiff's part, and that he had not broken his covenant on the defendant's part; also, that the pleading is too general, for that he ought to answer particularly in covenant to the breach assigned; and it was said, that though in actions founded upon tort, the declaration, being special, may be answered generally, yet in actions founded on a contract, a special declaration must be answered specially. The court at first doubted, but afterwards gave judgment for the plaintiff; for it is an issue, though argumentative and informal; for if he had not broken his covenant he was seised in fee, and if he was not seised in fee he had broken his covenant; that it is not wholly immaterial, and informal issues are cured by 32 H. 8, c. 30, after verdict, though immaterial ones are not.

Lev. 183; Sid. 289; 2 Keb. 10, 13, 47, S. C., Trin. 18 Car. 2, between Walsingham v. Coombe. [Vide *suprà*, p. 538, as to the plea of *non infregit conventionem*.]

[Where the issue is immaterial the court will award a repleader, respecting which the following rules are laid down by the court, in the case of Staple and Haydon, 2 Salk. 579; 6 Mod. 1; 2 Ld. Ray. 922. First, that at common law a repleader was allowed before trial, because a verdict did not cure an *immaterial* (a) issue; but now a repleader ought never to be allowed till trial, because the fault of the issue may be helped after verdict by the statute of jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment of repleader is general, namely, *that the parties should replead*; and the parties must begin again at the first fault which occasioned the immaterial issue. 1 Lord Raym. 169. Thus if the declaration is ill and the plea and replication are also ill, the parties must begin *de novo*; but if the plea is good and the replication ill, at the replication. Fourthly, no costs are allowed on either side. Fifthly, a repleader cannot be awarded after a default at *nisi prius*. To which it may be added, a repleader cannot be awarded after a demurrer or writ of error, but only after issue joined; and it is not grantable in favour of the person who made the first fault in pleading. (b)]

(a) The word is "*immaterial*" in the report; but it should seem to be a mistake: for the reason given if that word alone be used, is wholly unsatisfactory, inasmuch as a verdict does not cure an *immaterial* issue at this day. It should seem that the reason of the distinction between the practice before and since the statute of jeofails is this; that, before the statute, a verdict did not cure either an *immaterial* or an *informal* issue, and therefore a repleader was awarded before trial, because the trial could not have any effect upon the issue; but, since the statute, a verdict does cure an *informal* issue, and therefore the court will not interfere until the result of a trial is seen, which may render a motion for a repleader unnecessary. See 2 Saund. 319 b, (5th ed.) (b) 2 Will. Saund. 319, c. (5th ed.)

Where a plea is good in form though not in fact, or, in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, on the defendant's own showing, that, in any way of putting it, he can

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have no merits, and the issue joined thereon be found for him, there, as the awarding a repleader would not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or the defendant, then for their own sake, they will award a repleader. A judgment therefore *non obstante veredicto* is always upon the merits, and never granted but in a very clear case—a repleader is upon the form and manner of pleading.

Tidd's Prac. 922, (9th ed.) and cases there cited.¶

¶ Plea in bar that a *nolle prosequi* had been entered on a previous indictment for the same offence is bad.

Comm. v. Wheeler, 2 Mass. 172.g

3. *Of special Pleas; and therein, of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.*

The defendant is at liberty to plead the general issue, or traverse any material point of the declaration; but (a) he cannot plead a plea that amounts to the general issue; for pleas which amount to the general issue are only facts on which the issue may be turned in evidence, and therefore are not issues of fact, to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas; because they draw to the examination of the court what is proper to be determined by a jury.

{Vide 8 East, 311, Boot v. Wilson.} (a) Pleading that amounts to the general issue is not to be allowed; and when such plea is pleaded, it is a good cause of a special demurrer since 27 Eliz. c. 5, and before it of a general one. 10 Co. 95 a; ¶ Freeport v. Edgecumb, 1 Mass. 459; Thayer v. Brewer, 15 Pick. 257; Gardner v. Webber, 17 Pick. 407; Martin v. Woods, 6 Mass. 6.g The reason of pressing the general issue is not for insufficiency of the plea, but not to make long records when there is no occasion. Hob. 127. A plea which amounts to the general issue is only matter of form, Roll. R. 112, 3; and therefore must be specially shown as cause of demurrer. Cro. Car. 157. ¶Vide 6 East, R. 596; 8 East, R. 311.¶ ¶Dibble v. Duncan, 2 M'Lean, 553. When the matter pleaded amounts to the general issue, the plea is bad. Hill v. Allen, 5 Dowl. 471; 3 Bing. N. S. 454; 3 Scott, 555; Hayselden v. Staff, 6 Nev. & M. 659; 5 Ad. & Ell. 153; Taylor v. Hillary, 1 Cr. Mees. & R. 741.g

Where the defence consists in matters of law, there the defendant may plead specially; but where it is purely fact the general issue must be pleaded. And in all actions the defendant may show any matter to the court why the action does not lie; and this being matter of law, is proper to be shown to the court, and not to the jury; for being questions of law the judges are to determine whether they discharge or bar the plaintiff's action; but such bars or matters produced by the defendant may be traversed by the plaintiff, whether they are true or not, which subsequently draws them to the examination of a jury.

3 Mod. 166.

Whatever, therefore, makes the fact complained of to be lawful is matter of justification, and to be shown to the court; because the court are judges how far the fact, if done, was lawfully done; and therefore, on not guilty in trespass, the defendant cannot show a license to prove there was no trespass; (b) because though the license makes it no trespass, yet he shows that license to an improper jurisdiction, viz.: to the jury, who are not proper judges of the law.

5 Mod. 252; 2 Salk. 580, pl. 1; Hob. 174. ¶(b) 2 Term R. 166; 7 Taunt 156, acc. But in an action on the case a release may be shown on the general issue. Winter v. Brockwell, 8 East, 308.¶

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So if the defendant shows a release (a) of a debt to a jury, it is no evidence; because, though the release makes it to be no debt, he shows it to an improper jurisdiction. But though a man must show all matters to the court that confirm the fact complained of, and discharge it, yet where any thing goes in denial of the fact, there it must be given in evidence on the general issue; because whatever denies that cause of complaint is matter proper to be exhibited to the jury, who are judges whether the fact was, or not; and therefore actions of trover and *assumpsit*, which are modern inventions to get rid of the law-wager, which lay in the ancient action of debt and detainee, were so formed that almost every thing may be given in evidence on the general issue.

[(a) But a release may be given in evidence in *assumpsit* on the general issue. 1 Camp. 249; 2 Camp. 557.]

As in trover the plaintiff declares of the property of the goods and chattels, and that they came by finding to the defendant, whatever matters are alleged that confess property in the plaintiff will entitle him to his damages, and whatever deny it are on the general issue; and therefore levying by distress, releases, and the like, which were anciently in this action, are now given in evidence, because they disaffirm the property of the plaintiff on which his action is founded.

Vide tit. *Trover and Conversion*.

So in *assumpsit* the action is formed on a contract, and the trespass to the plaintiff is the non-performance of it; and though the issue be *non-assumpsit* instead of the old issue not guilty, yet on this issue every thing may be given in evidence which disaffirms the contract, for that goes to the gist of the action; since if there be no contract to be performed at the commencement of the action, there can be no trespass for the non-performance of it: and therefore a release goes to the gist of this action; for it shows there was no cause of action at the time this action was commenced; for as in trover he must have a right to the thing, so in *assumpsit* he must have a right to the thing declared on; therefore every thing that shows the contract to be void, as, nonage, or more money lost at play than the statute allows, may be given in evidence on the general issue. (b)

Vide tit. *Assumpsit*. [(b) So, on *non-assumpsit*, the defendant may give in evidence an usurious contract; for that makes it a void promise. Lord Bernard v. Saul, 1 Stra. 498; {3 Cran. 180, Levy v. Gadsby. See 1 Johns. Rep. 124, 125.} And in general, whatever affects the promise may be given in evidence on this plea; as, where a seaman had sued in the Admiralty Court for his wages, and had judgment against him there, and afterwards brought an *assumpsit* at law, the defendant was allowed to give the sentence in evidence on *non-assumpsit*. 2 Stra. 733.]

[[The defendant may give in evidence on the general issue in *assumpsit* all matters which show that the plaintiff *never* had any cause of action, and also most matters in discharge of the action, which show that, at the time of the commencement of the action, the plaintiff had no existing cause of action.

1 Chitt. on Plead. 742, and cases cited.]

But matters of law, which do not go to the gist of the action, but to the discharge of it, even in these new-framed actions, are to be pleaded, as the statute of limitations: so, if a less sum be paid before the time, because that is not a performance which destroys the being of the action, but a collateral agreement that destroys the performance of it.

Carth. 387; Salk. 278, pl. 1. [[But this is in the nature of *accord and satisfaction*, and might be now given in evidence on *non-assumpsit*.]

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If matter be pleaded which amounts to the general issue, yet if there be also a special matter of justification joined in the same plea, the plea is good.

3 Lev. 41.  $\beta$  When a plea sets up a contract incompatible with that stated in the declaration, it is bad as amounting to the general issue. *Morgan v. Pebrer*, 3 Bing. N. S. 457; 4 Scott, 230. $\gamma$

In trover the defendant pleaded a sale in a market overt, and thereby justified the conversion; and ruled that a *nihil dicit* should be entered if he did not plead the general issue, for that it amounted to it. And in another (a) case in trover the defendant pleaded another plea amounting to the general issue; and the court doubted whether they should compel him to plead the general issue, or award a writ of inquiry; but resolved at last to award a writ of inquiry.

Cro. Ja. 165. (a) Cro. Ja. 319.

In an action on the case by a commoner for digging pits, the defendant justified that he was lord of the soil and digged for coals, doing as little damage as he could, and that he left sufficient common; and on demurrer adjudged against him that it amounted to the general issue.

Sid. 106.

In trespass, if the defendant pleads property in a stranger or himself, it amounts to the general issue; otherwise in replevin, in which case it may be pleaded in bar or abatement. But where in trespass the plaintiff declared, that the defendant broke his close, and took *quædam averia*, &c., the defendant pleaded the cattle were his own, and that J S took them from him, and put them in the plaintiff's close by his assent, and that he took them, &c.; it was held a good plea; for the plaintiff does not declare that the property of the goods is in him; and when the defendant's beasts are taken from him by wrong, he may justify retaking them wherever he finds them.

Vent. 249; 2 Lev. 92; Cro. Eliz. 329.

Where the matter of the plea confesses the cause of action but avoids it, the defendant may plead specially, though he might have given it in evidence; otherwise where the matter of the plea does not avoid but deny, as in *assumpsit*, the statute of gaming may be pleaded, though it might be given in evidence on the general issue. (b)

Cro. Eliz. 871; Salk. 344, pl. 2; Ld. Raym. 87; Comyns, 4, pl. 4; 5 Mod. 175; Carth. 356; Holt, 328, pl. 2; 12 Mod. 96.  $\parallel$  (b) The statute of gaming may be specially pleaded, not because it confesses and avoids the plaintiff's claim, but because the defence is *matter of law*, which therefore ought to be shown to the court. See Lord Raym. 87, and so it is as to coverture, infancy, &c.

$\parallel$  In *assumpsit* for goods sold and delivered the defendant pleaded, that the goods were sold by A, the factor of plaintiff, with the privity of plaintiff, as and for the goods of A the factor, and that the defendant did not know that the goods were not the property of A; that at the sale and delivery A was and still is indebted to defendant in more than the value of the goods, and defendant is ready and willing to set off and allow to plaintiff the value of the goods out of the moneys so due and owing from A. The plea was specially demurred to, as amounting to the general issue, but the court held it good, as it was not in denial, but in confession and avoidance of the plaintiff's claim.

*Carr v. Hincheliff*, 4 Barn. & C. 547. $\parallel$

In trespass for taking his horse, the defendant pleads that the horse was the horse of J S, and that the plaintiff took and impounded him, and that he, the defendant, took him by replevin, &c.; this amounts to the general

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issue, for it does not so much as admit a possession in the plaintiff; for the taking and impounding gave him no possession, because the horse was thereby in the custody of the law, so no colour of action left to the plaintiff.

Salk. 394, pl. 2.

||To an action of *assumpsit* for use and occupation, the defendant pleaded specially, that he became bankrupt before the rent became due, and that by virtue of the commissioners' assignment all his term and interest became vested in his assignees, and that his assignees were possessed of and occupied the premises from the assignment to the time when the rent claimed became due; on demurrer this plea was held bad, on the ground that the bankruptcy did not discharge the defendant from his agreement to pay the rent; and *semble* that it was also bad as amounting to the general issue, since it in fact denied the defendant's occupation as tenant.

Boot v. Wilson, 8 East, 611.||

In *assumpsit* the defendant pleaded *quod ipse performavit omnia ex parte sua performand.*: and this was held to amount to the general issue; *sed qu.* for the *assumpsit* is admitted, so that this is but a discharge.

Salk. 394, pl. 3; 2 Ld. Raym. 968.

If a man executes a deed by (a) *duress* he cannot plead *non est factum*, for it is his deed, though he may avoid it by special pleading, judgment *si actio*, &c.

5 Co. 119, resolved *per curiam*; 2 Inst. 483, S. P. (a) In a plea of *per minas* the very manner of it, as, whether for fear of life, member, or imprisonment, ought to be specially laid. Vide Keb. 516.

||But it may be shown, on *non est factum*, that the deed was made by a lunatic, or that the obligor was made to execute the bond while drunk.

Yates v. Boen, Stra. 1104; B. N. P. 172.

So also where the deed is avoided by erasure, addition, &c., this may be shown on *non est factum*.

Powell v. Duff, 3 Camp. 181.||

[So if the bond were given for a gaming debt the statute should be pleaded; and the defendant in his plea should set out the game played at, and conclude *contra formam statuti*, that the court may see that it was within the statute.

Colborne v. Stockdale, 1 Stra. 493.] {In a plea to an action on a bond void because against a statute, it is not sufficient to state generally that the case is within the statute; but the defendant must set forth so much in his plea as to show that the case is within the statute. Willes, 241, Huggins v. Bambridge;} ||Com. Dig. *Pleader*; 2 W. 26; 1 Saund. 295 a.||

||So also the defendant must plead specially that the bond is void on the ground of the condition being an illegal restraint on matrimony. He cannot show this matter on *non est factum*.

Colton v. Goodridge, 2 Black. R. 1108.

So also that the consideration was an illegal agreement to compound prosecutions for felony.

Harmer v. Wright, 2 Stark. Ca. 35; and see 2 Chitt. R. 334.

So also if a bail-bond is not made according to the 23 H. 6, c. 9, a special plea is necessary.

Will. Saund. 59, note 3.||

Upon an issue *feoffavit vel non*, the jury found a feoffment, but a covinous one, and the court was of opinion, that upon this issue a covinous feoffment

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was a feoffment, and that if the party would have taken advantage of the coven, he ought to have done it by special pleading. It is there likewise said, that a *non est factum* cannot be pleaded upon the (a) statute of usury or sheriffs' bonds; the reason of which is, that these things have the appearances of feoffments and bonds, though they want the validity.

Hob. 72, *Humberton v. Howgil*. (a) Though the statutes relating to sheriffs' bonds and usurious bonds are penned in very strong terms, yet the bonds are void only as to their efficacy; for in these cases the defendant cannot plead *non est factum*, but must avoid them by special pleading. *Dyer*, 375 b; *Cro. Eliz.* 915; *Hob.* 72, 166.

¶ And in an action on a bail-bond, the defendant cannot, on the plea of *non est factum*, object, that the action is brought in a different court from that where the bond was conditioned for appearance.

2 Camp. 396.

It has however been decided that where the bail-bond was dated and made after the return day of the writ, the defendant might avoid it on *non est factum*. (b)

*Thompson v. Rock*, 4 Maul. & S. 338. (b) The court decided thus, on the ground that the defendant in such case might formerly have pleaded a special *non est factum*, and that now a special *non est factum* was never necessary. But it seems that the conclusion of the plea in such case would not have been, *et sic non est factum*, but, "and so the obligation is void." See *Lord Raym.* 349; 2 *Vent.* 237; 1 *Saund.* 159; *Bro. Abr. Non est factum*, 14; and the case does not seem consistent with the decisions above in the text, where a special plea is held necessary. See the note of the learned editor of *Coke's Reports*, 5 Co. 119 b, note (C). ¶

It is said by my Lord Chief Justice Holt, that all the special *non est factum* in case of *escrow* and *rasure* are impertinent, for thereby the defendant brings all the proof upon himself; whereas if he had pleaded *non est factum* generally, he would turn the proof of whatever is necessary to make it his deed upon the plaintiff. (c)

6 Mod. 218. (c) *Sed qu.* As to the case of an *escrow*; for it is his deed, though perhaps delivered to another on condition? Indeed in pleading an *escrow* some are of opinion it should conclude, and so not his deed. *Vide post.* ¶ In *Stoytes v. Pearson*, 4 *Espin.* 255, *Lord Ellenborough, C. J.*, allowed delivery as an *escrow* to be given in evidence, on *non est factum*, on the ground that it was a special *non est factum*, which, it seems, need never now be pleaded. *Vide* 4 Maul. & S. 338; and *vide Com. Dig. Plead.* 2 W. 18. ¶

In debt upon a lease for years the defendant may plead entry into part, upon which follows suspension, and it does not amount to the general issue. *Vent.* 2.

In every action on the case for a misdemeanor the defendant may plead generally not guilty, or traverse the point of the writ, as *ne forga pas*, *non egecit*, *non rapuit*, *non manumavit*, &c.

*Dyer*, 121; *Doct.* pl. 203.

But in trespass *non depascit herbas* is no plea, but he ought to plead not guilty, the other being only argumentative.

22 H. 6, 37; *Doct.* pl. 204.

In dower the tenant pleads, that the husband of the demandant was only tenant for life, the remainder in tail to his son; and this was held an ill plea, it amounting to the general issue *ne unques seise que dower*.

40 E. 3, 15; *Doct.* pl. 205.

In debt against an administrator, the defendant pleads, that the intestate was indebted to him by bond 80*l.*, and that goods to that value *et non ultra* came to his hands, which he detains for his debt; and on demurrer it was

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objected that it amounted to the general issue of *plenement administer*: but the better opinion of the court was, that this is no cause of demurrer, for the plea is (a) sufficient; and besides, it is some matter in law which hath been allowed always to be pleaded especially, and not left to a jury; and the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause, which is matter of discretion; and therefore it is to be moved to the court, and not to be demurred upon.

Hob. 127, Sir Henry Warner v. Wainsford. (a) That it is a good plea, and safer than pleading the general issue, Noy, 106; Winch. 19; Cro. Car. 157; Cro. Ja. 165; Leon. 178; Hob. 218, like point; and vide Raym. 230. [It was holden in *Plumer v. Marchant*, 3 Burr. 1380, as settled, that an administrator may either plead a retainer or give it in evidence on *plene administravit*.] §2 Black. R. 965. The advantage of pleading the retainer is, that it compels the plaintiff in his replication to admit either the debt due, or the sufficiency of assets.||

In an action on the case by a commoner, the plaintiff declared, that the defendant had enclosed the places in which the plaintiff had a right of common, and likewise had put his cattle in those places, by which he could not *in tam amplo et beneficiali modo* enjoy the same; the defendant pleaded, that he put his cattle in rightfully, and that the plaintiff had common enough; and on demurrer it was held, that the plea was the same as not guilty, and therefore amounted to the general issue; yet the court likewise held, that for that reason alone the plaintiff had no cause of demurrer; for that the defendant may well disclose the matter of law in pleading, which is a much cheaper way than to have a special verdict; and that this is on the same reason of giving colour; but if the matter by which the defendant justifies, be all matter of fact, and proper for the trial of a jury, then the defendant ought to plead the general issue.

2 Mod. 274, Birch v. Wilson.

In assault and battery at Maidstone *in com.* Kent, the defendant pleads, that he is possessed of a house in D, and that the plaintiff with another woman came to his door, and the other woman endeavoured to turn him out of possession, and thrust him down, and that in his fall he threw down the plaintiff against his will and fell upon her; *absque hoc*, that he is guilty of a battery at Maidstone or any other place *extra*, &c. Plaintiff demurs, 1st, (b) Because the defendant has traversed the place without alleging any such local justification as to make it material. 2dly, Because the plea amounts to the general issue. *Per cur.*—The justification, if we may call it so, is local; but the plea does amount to the general issue; but we are not bound to give judgment for the plaintiff upon that, though he do assign it as cause of demurrer; it is a discretionary thing, and we may allow of a plea that does amount to the general issue, if it contain any thing that may breed a scruple in the *lay gents*; and therefore they advised the parties to compound the matter.

Pasch. 29 C. 2, in C. B., Nicholls v. Jeames. (b) For this vide Cro. Eliz. 705.

An action on the case was brought upon a bill of exchange, to which the defendant pleaded, that after the acceptance of the bill he gave a bond in discharge thereof; and upon demurrer to this plea it was objected that it amounted to the general issue; for, the debt upon the bill being extinguished by the bond, the defendant ought to have pleaded *non-assumpsit*, and to have given the bond in evidence; and the court seemed to be of that opinion; but by consent the defendant pleaded the general issue.

5 Mod. 314, Hackshaw v. Clerk.



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By the statute of bankrupts, 5 Geo. 2, c. 30, § 7, a liberty of pleading *generally* is given to the bankrupt, and thereby he may avoid the hazard of pleading *specialty*; but then he must take upon himself the proof of his conformity to the statute in every particular; or, if he thinks fit to plead the matter specially, then he must set forth every point; and by it he has this advantage against the plaintiff, that he must reply to one particular only, upon which issue must be taken; but, where he pleads the matter specially, but does not set forth the whole, judgment must be given against him; for by the act it is so to be pleaded as that the whole merits may be tried.

5 G. 2, c. 30, § 7; 1 P. Wms. 258. [Vide tit. *Bankrupt*, *supra*, Vol. I. A general plea of Bankruptcy in Ireland, referring to an Irish act of parliament, and concluding to the country, (in a mode similar to that given by stat. 5 G. 2, c. 30, § 7, to Bankrupts in England,) is bad. *Quinn v. Keep*, 2 H. Bl. 553.]

¶ The general plea of bankruptcy given by the 5 Geo. 2, c. 30, § 7, is sufficient, not only where the certificate has been obtained previous to the commencement of the suit, but where it is obtained at any time before plea: and this construction is consistent with the form of the plea given, which is merely, "That the cause of action accrued before such time as the defendant became bankrupt."

*Harris v. James*, 9 East, 82; and vide 6 East, 413.

And a bankrupt may on this plea avail himself of the discharge given him by the 49 Geo. 3, c. 121, § 8, against the claim of a surety who has paid the bankrupt's debt subsequent to the bankruptcy; for the words of that statute place the bankrupt in the same situation, as to such surety, as if he had been a creditor before the bankruptcy.

• *Westcott v. Hodges*, 5 Barn. & A. 12.

Bankruptcy of the defendant cannot be given in evidence on the general issue.

*Gowland v. Warren*, 1 Camp. 362.]

In trespass for taking three cows at Beomister in Dorsetshire, the defendant pleaded specially, that the Bishop of Sarum was seised in fee of the hundred of Beomister in the right of his bishopric, and that he and all his ancestors, time out of mind, had a hundred court of all personal actions under 40s., and of replevin within the said hundred from three weeks to three weeks; and that the bishop, and all those whose estates, &c., had used time out of mind by their steward of the said hundred, upon complaint made, &c., to replevy cattle unjustly taken at any place within the said hundred, and that the bishop had demised the said hundred unto Carleton Whitlock, Esq., for three lives, by virtue of which he was seised, &c., and that the plaintiff and T S took those cows, being the cows of one E G at Beomister within the said hundred, and impounded them there, and thereupon the said E G complained to Henry Samways, steward of the said Carlton Whitlock of his hundred court aforesaid, of the unjust taking the said three cows; and that thereupon the said steward made his precept to the bailiff of the said hundred, &c., to replevy those cows; by virtue whereof the defendants took them and delivered them to the said E G. On a special demurrer to this plea, for that it amounted to the general issue, it was adjudged that the plea, in the form it was drawn, did amount to the general issue, for that the defendants had not admitted by their plea so much as a possession of the cows in the plaintiff at the time of taking, &c., for they say the cows were then impounded, which is the custody of the law, and not of the party, so that

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the defendants, by their plea, had not given any colour of action whatsoever to the plaintiff.

Carth. 380; 5 Mod. 252, Hallet v. Byrt.

If there are three or more partners, and an action is brought against two of them, and they plead the partnership, this amounts to the general issue. (a)

Carth. 63, *per* Holt, and two other judges. (a) The text is equally erroneous, as I conceive the reporter, Carthew, to be; no such plea of partnership being pleaded. The defendants pleaded the general issue of not guilty; and though in Carth. it is said that judgment was given for plaintiff, yet Salk. and all the other reporters of this case, who are numerous, expressly say judgment was given for defendants, by reason of all the partners not being made defendants. It was to be sure argued that such matter ought to have been pleaded in abatement, if defendants mean to take advantage of such matter; but then it was doubted whether it was pleadable in abatement, it only amounting to the general issue. Vide 2 Salk. 440. N. B. This case in Carthew was against some of the owners of a ship, for damages to goods. [It was in form an action of *assumpsit*, and its authority hath been denied in latter cases; for it hath been holden, that in *assumpsit* against one partner, the partnership must be pleaded in abatement, and cannot be given in evidence. Rice v. Shute, 5 Burr. 2611; Abbott v. Smith, 2 Black. R. 947. And the law is the same in an action of the custom of the realm. Buddle v. Wilson, 6 Term R. 369. In an action *ex delicto*, that there are other partners not named, is no cause of abatement, for every *tort* is several. Mitchell v. Tarbutt, 5 Term R. 649.] {See *Abatement*, K.}

In many cases, though a man plead a thing which may be given in evidence, yet this shall not amount to a general issue; as where the plea goes by way of confession and avoidance, as in trespass where the defendant acknowledges the plaintiff to have a good cause of action, unless for the matter which the defendant has pleaded in his plea; in such case such plea shall not amount to a general issue.

Skin. 362, pl. 5, *per* Holt. [See 4 Barn. & C. 547.]

In an appeal of mayhem if the defendant plead not guilty, he cannot give in evidence that it was *se defendendo*, but ought to plead it by way of justification in bar of the action.

2 Inst. 316. [And so it is in an action of assault and battery, 1 Will. Saund. 77, 996.]

In trespass brought by R for breaking his close and beating his servant, and carrying away his goods; upon not guilty pleaded the jury found this special matter, viz., that Sir F. B., Chancellor of England, was seised, and leased to the plaintiff and one A, which A assigned his moiety to one C, by whose command the defendant entered: And it was moved in arrest, &c., that this tenancy in common betwixt the plaintiff and him in whose right the defendant justifies could not be given in evidence; so it could not be found by verdict, but ought to have been pleaded specially: but the whole court was against that, and held that it might be given in evidence. (b)

3 Leon. 94, Rosse's case. [(b) See Cubitt v. Porter, 8 Barn. & C. 257.]

In debt for rent, if the lessor has nothing in the land, the lessee may plead that the lessor *non dimisit*, and give in evidence the other matter.

Co. Lit. 47 b. In debt for rent the defendant may plead *nil debet*, and give in evidence *nil habuit in tenementis*, *per* Holt, C. J. Or on such plea may give eviction in evidence. Comb. 238. [But in *assumpsit* under the stat. 11 G. 2, for use and occupation, *nil habuit in tenementis* is not good. Lewis v. Willis, 1 Wils. 314.] [And where the demise is by indenture *nil habuit in tenementis* is a bad plea, for the tenant is estopped by the indenture to plead it. Co. Lit. 47 b; Wilkins v. Wingate, 6 Term R. 62. But in such case the lessor must rely on the estoppel in his replication, and must not traverse the plea. Kemp v. Goodal, 1 Salk. 277; Veal v. Warner, 1 Saund. 324, 325, note 4; or, if the declaration state the lease to be by indenture, then the plaintiff may demur to the plea, since the estoppel appears on the record. Ibid. The tenant, however, is not

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estopped from showing that the lessor was only seised in right of his wife, and that she died before the covenant was broken, for that shows an interest to have passed and to be determined, and then there is no estoppel. *Blake v. Foster*, 8 Term R. 487; *Andrew v. Pearce*, 1 New R. 158. An assignee is bound by the estoppel which bound his assignor, and therefore the assignee of a lease by indenture cannot plead *non dimisit*. *Taylor v. Needham*, 2 Taunt. 278. And the assignees of a bankrupt lessor have the benefit of the estoppel, and therefore a tenant cannot plead *nil habuit, &c.*, to an action by the assignees on the lease, since he could not have pleaded it to an action by the lessor. *Parker v. Manning*, 7 Term R. 537. Though it is only in cases of demise by indenture that an estoppel can be replied to the plea of *nil habuit, &c.*; yet a tenant is now in no case permitted to dispute the title of the landlord under whom he came into possession. *Cook v. Loxley*, 5 Term R. 4; *Phipps v. Sculthorpe*, 1 Barn. & A. 50; *Doe v. Lady Smith*, 4 Maul. & S. 347; *Rennie v. Robinson*, 1 Bing. 147; *Doe v. Budden*, 5 Barn. & A. 626. And therefore the dictum of Holt, C. J., *supra*, in Comb. 238, seems not to be law. A lessee may, however, show his landlord's title to be expired, though he cannot show that he had none. 4 Term R. 682; 3 Maul. & S. 516; 2 Stark. 230; and see *Alchorne v. Gomme*, 2 Bing. 54; *Pope v. Bigge*, 9 Barn. & C. 251.¶

In waste the defendant may plead *nul wast fait*, and give the lopping of trees in evidence.

*Dyer*, 92 a, pl. 16.

But if waste be assigned in houses, and the defendant plead *nul wast*, he cannot give in evidence that the houses were repaired before the action brought, but ought to plead it specially; for having once committed waste, he ought to discharge himself by showing the special matter to the court, which would be a good bar.

*Dyer*, 276 a, pl. 51.

In an action brought against Jacob a goldsmith, upon a bill of exchange drawn by the Lord Chandois on the said Jacob for 112 guineas, which was accepted by him, the defendant pleaded in bar, that after the 29th of September, 1664, and before the making that bill of exchange, viz., on such a day, the said Lord Chandois and the plaintiff Hussey played together with dice, at a certain play, called hazard, upon tick and credit, without ready money, and that the Lord Chandois then and there at one time and meeting lost to the plaintiff the said 112 guineas upon tick, and that for the security of the payment of the said guineas lost as aforesaid the said Lord Chandois, on the day and year in the declaration, &c., made the said bill of exchange, and directed it to the defendant requesting him to pay, &c., and that the defendant did accept of the said bill and assume upon himself, as the plaintiff had declared, *quorum præmissorum prætextu et vigore statuti in eo casu edit. et provis.*, the said bill of exchange so by him accepted, and the acceptance thereof, and the promise of the said defendant so as aforesaid made, *devenerunt et fuerunt et modo sunt vacua, et nullius vigoris in lege, et hoc, &c.* To which the plaintiff demurred, and showed for cause, that it amounted to the general issue. *Sed per cur.*—The plea is good, both as to the matter and form, and it does not amount to the general issue; and it is not a rule, that because such a matter may be given in evidence, therefore it ought not to be pleaded specially; for it often happens to be in the election of the defendant, either to plead it specially or not, as he may be advised; as for instance, the pleading of a release, coverture, or infancy, in an *assumpsit* is certainly good; and yet those things may be given in evidence upon *non-assumpsit* pleaded: however the defendant sometimes may not be willing to put such matters of law to the judgment of the jury, or, perhaps, may design to save the costs of a special verdict.

*Carth.* 356; 5 Mod. 175; *Salk.* 344, pl. 2; *Ld. Raym.* 87; *Comyn*, 4, pl. 4; 5 Mod.

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175; Carth. 356; Holt, 328, pl. 2; 12 Mod. 96, *Hussey v. Jacob*. || See 4 Barn. & C. 547. ||

In debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, (a) for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense: but in case on *non-assumpsit* the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise.

Salk. 278, pl. 1, ruled by Holt at Hertford assizes. || (a) This doctrine seems questionable; and the practice is to plead the statute in debt as well as in *assumpsit*; and the reasons for pleading it are equally applicable to both forms of action. Vide 1 Saund. 283, n. 2; 2 Saund. 63 a, n. 1. And Bayley, J., decided that it could not be given in evidence on *nil debet*. *Woodhouse v. Williams*, York Summer As. 1829. ||

[Whatever is matter of inducement may be given in evidence on the general issue: *secus*, of matter of substance.

4 Burr. 2469.

A proviso in the same act of parliament whereon an action is brought, and the matter provided in it, may be given in evidence on the general issue: as, in an action against a parson for merchandising, contrary to 21 H. 8, c. 13, which has a proviso for necessaries to maintain his household. So it seems that a proviso in the bribery act of 2 G. 2, c. 24, that a person, who has been a discoverer, shall not be an object of that law, may be taken advantage of under the plea of *nil debet*.

4 Burr. 2469.]

[On a prosecution for exercising a trade contrary to the provisions of a statute, the defendant may show, on the general issue, that he is exempted from penalties by a subsequent act.

*Rex v. Pemberton*, 1 Black. R. 230.

On the trial of an indictment against a parish for not repairing a highway, the defendants may, on the general issue, give in evidence an act of parliament which exempts them from repairs, and transfers it to the commissioners.

*Rex v. Inhabitants of St. George*, 3 Camp. 222. ||

#### 4. Of sham Pleas, and the Consequence of false Pleading.

The pleading a sham plea, or such a one as the party knows to be false, is a great abuse of the justice of the court; and such pleas have not only been set aside with costs, but the parties censured, and otherwise punished according to the discretion of the court.

{Salk. 516, *Pierce v. Blake*; 1 East, 370, *Solomons v. Lyon*.}

If it appears judicially to the court, on the defendant's own showing, that he hath pleaded a false plea, this a good cause of demurrer; as, where the defendant brought an indenture into court, and pleaded that it contained no covenants, and on inspection it appeared to contain several, judgment was given against him.

Saund. 316, *Smith v. Yeomans*.

It hath been holden, that pleading a false plea is within the statute of Westm. 1, (3 ed. 1.) c. 29, which my Lord Coke says, was made in affirmation of the common law.

2 Inst. 215; Vent. 213.

[By this statute, if a serjeant or pleader do any manner of deceit in the King's Court, or consent unto it, to beguile the court or the party, he shall

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be imprisoned for a year and day, and from thenceforth shall not be heard to plead, and if he be no pleader he shall suffer the imprisonment. ||

If therefore, says he, a serjeant, or an apprentice of the law, in pleading a matter of fact issuable for his client, allege the same to be done at a town in such a county, where indeed he knoweth there is no such town, of purpose to delay justice *et a' enginer la court*, this is a deceit within the statute, and hath been so holden.

2 Inst. 215.

And if the client would have the attorney plead a false plea, he ought not to do it, for he may plead *quod non sum veraciter informatus et ideo nullum responsum*, and that shall be entered in the roll to save him from damages in a writ of deceit; and if an attorney ought not wittingly to plead a false plea, *a fortiori*, (a) a serjeant or apprentice ought not to do the same.

2 Inst. 215. (a) Though counsel are obliged to be faithful to their clients, yet not to manage their causes in such a manner as justice should be delayed or truth suppressed. Vent. 213, *per Hale*.

|| Where the defendant pleaded a false plea in abatement that the plaintiff was dead, it was moved that the attorney might be compelled to swear it, and Holt, C. J., said, they could not compel him to swear any plea except a foreign plea, but he might be fined for the deceit; and they ordered him to plead immediately, so as he would stand by it, or the court would inquire into the truth of the plea, and if there were a deceit, fine him.

*Pierce v. Blake*, Salk. 515.

So where the defendant pleaded a set-off of a sum due on recognisance, and of another sum due on simple contract, and the replication was bad, the court permitted the plaintiff to amend without costs, on the ground of the plea being a sham plea, and to discountenance such pleading.

*Solomons v. Lyon*, 1 East, 369.

And where sham pleas have been pleaded of judgment recovered in the court of Pie-poudre in Bartholomew fair, in terms palpably fictitious,—of a set-off due on recognisance, and on simple contract, of judgment recovered and payment, or judgment recovered, and delivery of goods in satisfaction, which require different modes of trial, or a subtle plea which obliges the plaintiff to consult counsel,—the courts have, on affidavit of the falsehood of the pleas, permitted the plaintiff to treat them as nullities, and sign judgment; and have, in several instances, made the defendant or his attorney pay the costs of the pleas, and of the application to the court.

*Blewitt v. Marsden*, 10 East, 237; *Penfold v. Hawkins*, 2 Maule & S. 606; *Thomas v. Vandermoolen*, 2 Barn. & A. 197; *Bartley v. Godslake*, Ibid. 199; *Bones v. Punter*, Ibid. 777; *Shadwell v. Berthoud*, 5 Barn. & A. 750; *Richley v. Proone*, 1 Barn. & C. 286; and vide 3 Taunt. 338.

However, in a subsequent case the court refused to permit the plaintiff to sign judgment, or compel the defendant to verify his plea, though the plea was precisely similar to that in *Richley v. Proone*.

*Merington v. Becket*, 2 Barn. & C. 81; and see 1 Bing. 380. ||

In debt upon an obligation the defendant pleaded *non est factum*, and afterwards *relicta verificatione* confessed the action, and the judgment against him was *in misericordia*: it was moved, that it should be *capiat*, (b) because he once denied his deed, and so ought to be fined to the king; and of this opinion was Gawdy; but Fenner and Williams held otherwise, because a fine is not payable but where he denies his deed, and it is found against him

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upon a false plea, and the jurors are troubled with the trial thereof; there, for troubling the king's courts, and for troubling the country, and the falsity of his plea, he shall be fined and imprisoned; but when it is not found against him, but he relinquishes his plea, he shall only be amerced, and accordingly the judgment was affirmed.

Cro. Ja. 64, Davis v. Clerk. (b) The *capiatur pro fine* is taken away, and other provision made in lieu thereof, by 5 W. & M. c. 12.

In dower if the tenant pleads non-tenure for part, and detainee of charters for the residue, and these pleas are found against the tenant, the defendant shall recover damages for all the time from the death of her husband, without any defalcation, for which reason the tenant ought to be careful that he does not plead a false plea.

Co. Lit. 366 a.

If an obligation be made to pay money at a certain day and place, payment before the day and at another place is a good discharge: yet in pleading, if the defendant says, that he paid at the same day and place, according to the obligation, the issue will be found against him, unless the jury help him, which they are not obliged to do, his plea not being in strictness true. (a)

Dyer, 999; Doct. pl. 181. (a) If the bond is conditioned to pay on or before, payment before the day, *scil.* such a day is good. Anon. T. 3 G. 3; 2 Wils. 173.—If money is payable *at or before* such a day, and is paid before, it should be pleaded, paid at such precedent day; and plaintiff may reply, not paid that day, nor before, nor after. Fletcher v. Hennington, Pasch. 33 G. 2; 2 Burr. 944.

In a formedon, if the tenant pleads warranty and assets descended, and the demandant takes issue thereon, and the issue is found for the demandant that assets did not descend, and thereupon the demandant recovers; in this case, although assets afterwards descend, yet the tenant shall never have a *scire facias* on the same judgment; for by his false plea he hath lost the benefit of the statute of Gloucester, and of the statute *de donis* in this point.

Co. Lit. 366; Doct. pl. 180.

If an heir at law pleads *riens per descent*, which is found against him, there shall be a general judgment of his body and other lands and goods, because of his false plea.

Doct. pl. 181. Vide title *Heir and Ancestor*. ¶Vide 2 Saund. 7, n. 4.¶

But in a writ of annuity against one as heir to his ancestor, the defendant pleaded, *non est factum patris sui*, and found against him; whereupon it was moved, that the execution ought to be awarded of his proper lands and of his lands descended, because he had pleaded a false plea: but *per cur.*—The denying the deed to be his father's was not a false plea in his cognisance; and although it were false, yet being charged in respect of his ancestor's deed, the land of his ancestor shall only be taken in execution, for that is the cause of his charge.

Cro. Car. 436.

## (H) Traverse: And herein,

## 1. The Nature thereof.

A TRAVERSE is the denial of some material point alleged in the pleadings, and which, if properly taken, closes (b) the issue. It may be taken to the declaration, bar, replication, &c.; and therefore, if properly taken to the declaration, it destroys the plaintiff's action; and if to the bar, it destroys

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what is said in avoidance of the action; and if to the replication, what was said in avoidance to the bar.

Doct. pl. 344; 2 Lil. Reg. 586; Co. Lit. 282; Yelv. 195. (b) In most cases it does not close, but only offers the issue; and if the traverse is material, issue must be taken thereon by the adverse party: a traverse, properly so called, being by *absque hoc*, or without that, that, &c., and concluded with a verification. The author may here, perhaps, mean a general traverse, or a positive denial of the most material fact alleged or pleaded by the opposite party; in which case the party so denying, concludes to the country: but the common acceptance of the term is, where issue is offered in the above-mentioned form, the party concluding with a verification.—N. B. A general traverse *absque tali causa* concludes to the country. ¶ Vide *post*, as to the conclusion of the replication; and 1 Saund. 103 a.]

But, for the better understanding the nature of a traverse, we shall, in the first place, insert some general rules that have been laid down herein.

And first it is laid down, that where a matter is expressly pleaded in the affirmative, which is expressly denied by the other party, there a traverse is needless; because in such case a sufficient issue is joined.

36 H. 6, 15; Cro. Eliz. 755; Lit. Rep. 15, same rule; Vent. 101, same rule laid down; and that if it were otherwise, they might traverse one upon another *in infinitum*.

As, where in *audita querela*, to avoid the execution of a recognisance, the plaintiff set forth that it was defeasanced upon the payment of divers sums of money at certain days, and that he was at the place appointed and tendered the money, and that the defendant was not there to receive it; the defendant pleaded *protestando* that the plaintiff was no there to pay it; and that he was there ready to receive it, *absque hoc* that the plaintiff was ready to pay it, which being specially demurred to, the court held the plea naught; and that there being an express affirmative and negative there should have been no traverse.

Cro. Eliz. 754, 755, Huish v. Phillips.

So if in an assize the defendant pleads a feoffment by a stranger, which he avers to be absolute and without any condition, and the plaintiff replies that it was on condition, this is sufficient without any further traverse.

2 Roll. R. 35; Hob. 71, 72.

But this rule, that there shall be no traverse where the matter alleged by one party is expressly denied by the other, must be understood of those cases where the denial makes a complete issue; for though the matter contradicts, that is not sufficient without an apt issue is formed upon an affirmative and negative; as where the death of a man is positively alleged on one part and his life by the other party, here the death ought to be traversed, (a) otherwise no issue is joined.

5 H. 7, 5, 6; Vent. 213; Lutw. 15. (a) *Sed qu. de hoc*, unless the traverse conclude to the country.

A traverse, therefore, seems to be properly taken when the adverse party to the declaration, plea, replication, &c., forsaking the general issue, sets up a title for himself, or sets forth a particular specification of his case, with a justification thereof, &c., with a traverse, (b) *absque hoc*, or denial of the matter alleged by the adverse party, or that the same is true in that (c) manner and form he hath alleged; and such specification is called an (d) inducement to the traverse.

Hob. 103, 104. (b) That *absque hoc*, so that without that, &c., are the proper words of a traverse. Sand. 22; 2 Salk. 628, pl. 2; Ld. Raym. 349. (c) Where the words *modus et forma* are only words of form and not of substance, and the diversities therein, vide Co. Lit. 281; Doct. pl. 344. (d) Such inducement is said to be the showing of cross matter contrary to the allegation of the adverse party. Dyer, 365, pl. 33.

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Hence it is said to be a rule, that when any thing pleaded specially by the defendant is directly contrary to the matter in the declaration, such plea is not good without a traverse; yet it is in the election of the other party to waive the advantage thereof, or demur thereupon.

The inducement to the traverse ought to be (a) sufficient in matter.

Cro. Car. 336. (a) Also it is said to be a rule that nothing can be an inducement to a traverse but such a thing as is traversable. 2 Leon. 32, *per* Manwood. [In general, the inducement to a traverse cannot be traversed: it ought, however, to be such as, if true, will defeat the title of the other party; otherwise it amounts to a negative pregnant. *Per* Parker, C. B. Park. 131.] ¶ But if a traverse be not to the substance and point of the action, the other party may either pass it by, and traverse the inducement, or demur specially for this cause. See 1 Will. Saund. 22, note.¶

A traverse ought not to be taken but where the thing traversed is issuable. (b)

3 Mod. 390. (b) That matter of law cannot be reversed, Yelv. 200, nor where part is matter of law, and part matter of fact. 2 Mod. 55. [Hence, in an information in nature of a *quo warranto*, the defendant made title under the constitution of Honiton, and then traversed the usurpation: the attorney-general, without taking any notice of the title, joined issue on the traverse; and it was holden to be ill, because the user being admitted by the defendant's making title, the usurpation was a matter of law, not to be sent to a jury. *Rex v. Blagdon*, Pasch. 1 Geo. cited in 2 Stra. 841.—But matter of law connected with fact is clearly traversable; as seisin in fee, or in tail, *Ewer v. Moile*, Yelv. 140; simony, *Rast. Entr.* 532 a; right of a county to repair a bridge, 2 Lev. 119; right to present to a church. *Grocers' Company v. Archbishop of Canterbury*, 3 Wils. 234; 2 Black. R. 776.] ¶ It has been considered, that the traverse in 2 Lev. 119, of the obligation to repair a bridge, is bad. See *Doug.* 154; 1 Will. Saund. 23, note 5. But this has been since doubted: and in 1 Barn. & A. 348, *Rex v. Ecclesfield*, one of the objections to the plea was, that it did not conclude with a traverse of the obligation of the parish to repair. But the court said, that if such a traverse were necessary, the conclusion of the plea "and that the inhabitants of the said parish at large ought not to be charged," was a sufficient and effectual traverse.¶

And therefore where, in ejectment upon a lease made by E J, the defendant pleaded, that before E J had any thing to do, &c., M J was seised in fee, after whose death the land descended to his heir, and that E entered and was seised by abatement; the plaintiff replied, and confessed the seisin of M, but said, that he devised it in fee to E J, who entered; *absque hoc* that E J was seised by abatement; upon demurrer this was held to be an ill traverse; for the plaintiff had confessed the seisin of M, and avoided it by the devise, and therefore ought not to have traversed the abatement; for having derived a good title by the devise of the lessor, it is an argument that he entered lawfully, and it was that alone that was issuable, and not the abatement; therefore it was ill to traverse that, because it must never be taken, but where the thing traversed is issuable.

Cro. Ja. 221; Yelv. 151, *Bedell v. Lull*. [In this case, according to Yelverton, the court said, that the traverse ought to pursue the very words of the plea traversed. Though perhaps this may be too strict, and it may be not necessary to follow the very words of the plea; yet, most certainly, the traverse must be *ad idem*, it must be the same with the plea in effect and substance; thus where in trespass a plea alleged the injury to be in consequence of cutting a beam, the replication, traversing its being previous, was adjudged ill. *Humphreys v. Churchman*, Ca. temp. Hardw. 289.] ¶ It is clear, according to the case in the text, that where a material point alleged by one party is fully confessed and avoided, then it must not also be traversed; and see Cro. Car. 384; Hob. 104; and so also where a party sets up matter consistent with, but qualifying the matter on the other side, he should not also traverse. *Kenchin v. Knight*, 1 Wils. 253.¶

The traverse is regularly to be taken to the (c) most material point alleged by the other party, and is not to be (d) multifarious but to a single point.

(c) 3 Sand. 5, 28; Roll. R. 235; and *vide infra*. (d) 3 Lev. 40, 41. β A traverse



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may be taken to any number of facts, if the whole of those facts make only one point. *Strong v. Smith*, 3 Cain. R. 160.<sup>g</sup>

But any part of what the defendant (a) makes his title is traversable; as, if in trespass the defendant allege a seisin in fee in J S, and a demise to himself; the plaintiff may traverse either the seisin in fee or the demise, at his election.

Hard. 317. <sup>β</sup>In trespass, when the defendant pleads, that a third person was in possession of the *locus in quo*, and demise to him for a year, the plaintiff may traverse both the seisin and the demise. *Strong v. Smith*, 3 Cain. R. 160.<sup>g</sup> (a) But a defendant cannot traverse a matter not alleged in the declaration. 2 Vent. 79; 2 Lutw. 1560, 1480. But if the plaintiff assign several breaches, the defendant may traverse any of them. Salk. 138.

Also when the defendant traverseth any part of the plaintiff's count or declaration in a *quare impedit*, it ought to be such part as is inconsistent with the defendant's title, and being found against the plaintiff absolutely destroys his title; if it do not so, however inconsistent it be with the defendant's title, the traverse is not well taken.

Vaugh. 8. [See 1 Will. Saund. 22, and 209, note 8.]

It is laid down as a general rule in all the books which speak of this matter, that there cannot be a traverse upon a traverse, that pleadings and proceedings may not be endless; for if that were permitted each party might go on traversing *ad infinitum*.

But for the exceptions to this general rule, vide *infra*.

An issue joined upon an *absque hoc* ought to have an (b) affirmative after it.

Co. Lit. 126. (b) Salk. 4, pl. 10, S. P., admitted to be the general rule; but the court seemed to think, that where an *absque hoc* comprises the whole matter generally, as *absque tali causâ*, it may conclude *et de hoc ponit se super patriam*; but where it only traverses a particular matter, as *absque tali warranto*, &c., it ought to be averred. 7 Mod. 105, L. P. [Although it is a general rule that a traverse must conclude with a verification, yet it may, and when it comprises the whole substance of the plea it ought, to conclude to the country. *Boyce v. Whitaker*, Dougl. 96; *Haywood v. Davies*, 1 Salk. 4; *Robinson v. Rayley*, 1 Burr. 316; *Smith v. Dovers*, Dougl. 428; *Hedges v. Sandon*, 2 Term R. 439;] {2 Johns. Rep. 428, *Snyder v. Croy*.}

In assault and battery the defendant pleaded a release of all actions, &c. The plaintiff replied that the release was gotten by duress, &c. The defendant rejoined, and showed cause why it was not gotten by duress. [The plaintiff sur-rejoined that it was gotten by duress;] *absque hoc* that it was voluntary, *et hoc petit quod inquiretur per patriam*: upon this issue the cause was tried, and the plaintiff had a verdict; and it was moved in arrest of judgment, that he ought not to conclude to the country after a traverse; because a traverse itself is negative, and therefore the defendant ought to have joined issue in the affirmative: it was admitted, that if issue had been joined before the traverse it might have been helped by the statute of jeofails; but not being so in this case, the judgment was arrested.

3 Mod. 203.

[According to the modern rules of pleading, the defendant in the above case would have rejoined, denying that the release was gotten by duress, and concluding to the country.

The general rule as to the conclusion, appears now to be that where the replication denies the whole of the matter in the plea, it may conclude to the country; but where a particular fact is selected and denied, there the replication *must* conclude with a verification. The last part of the rule is

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invariable. The former part appears only to be imperative in some cases; as, for instance, in replying to a plea of accord and satisfaction, that the plaintiff did not accept in satisfaction; there the replication *must* conclude to the country. But in some cases a conclusion either way seems to be good.

Hedges v. Sandon, 2 Term R. 439; 1 Will. Saund. 103 a, and the cases there digested.

It seems therefore to be a safe rule, that where the replication is such that the defendant cannot take any new or other issue in his rejoinder than a repetition of the matter in his plea, without a departure from the plea, that the replication in such case ought to conclude to the country. And such is generally the modern practice in pleading. As, for instance, in trespass the defendant pleads a license; if the replication deny it, the conclusion should be to the country, there being a direct affirmative and negative: for if the plaintiff reply with a special traverse, and a conclusion with an averment, the rejoinder can only repeat what is already alleged in the plea, viz., that the plaintiff did give a license. As this rule tends to avoid prolixity in pleading, it will probably in all cases be safe; although as the general course of older precedents is to traverse in such cases with an *absque hoc*, and an averment, the courts would probably hold either mode of replying good.

2 T. R. 439; 1 Will. Saund. 103 b, and the cases there cited.||

If the defendant's plea be in the negative, the plaintiff need not traverse it, for a negative cannot be traversed; and therefore if an executor or heir in debt, for a debt due by the testator or ancestor of the defendant, pleads no assets, or *riens per descent præter*, &c., the plaintiff, without traversing the *præter*, may reply generally assets *ultra*, without saying what or where they are.

Palm. 511; 2 Mod. 50. But for this vide 8 Co. Mary Shipley's case, Cro. Car., Dorchester v. Webb, Hob. 104; Yelv. 165.

But for the fuller explication of this matter we shall consider more particularly:

## 2. In what cases a Traverse is permitted.

It hath been held, on the 26 H. 8, c. 3, for payment of tenths, which enacts, *That after default and certificate made thereof to the court under the seal of the bishop, the benefice shall be void*, that the party may traverse such certificate; for herein the bishop acts only as an officer, not as a judge.

Cro. Eliz. 80; Leon. 269; Moor, 541, 915; Savil, case, 63.

But if on a trial of general bastardy, the party be certified a bastard by the ordinary, such certificate cannot be traversed, for herein the ordinary acts as judge; and such certificate shall bind perpetually the person certified a bastard, though he was not party to the suit; as all persons are estopped to speak against the memorial of any judicatory, because the act of the public judicatory, under which any person lives, is his own act; and were they not thus bound there might be contradiction in certificates.

Roll. Abr. 362.

If upon a judgment obtained by A he sues out a *scire facias*, upon which J S is returned ter-tenant, he cannot traverse this return of the sheriff.(a)

2 Mod. 10, Whitrong v. Blaney. (a) That a sheriff's return of a rescous cannot be traversed. Dyer, 212; Cro. Eliz. 780.

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On the statutes against forcible entries and detainers it hath been holden that one justice of peace may make a record of a forcible detainer, and that such record is not traversable; because the justice of peace, in making thereof, acts not as a minister but as a judge.

Hawk. P. C. c. 64. Vide title *Forcible Entry and Detainer*.

It hath been held that presentments in the quarter sessions of the peace, and even in B. R., are traversable; and that if it be so in courts superior to the leet, *à fortiori* it must be so in presentments at the leet.

Carth. 74; but for this vide Hawk. P. C. c. 76, § 72, 83; 2 Hawk. P. C. c. 11.

It is held that whenever an escape is finable the presentment of it is traversable; but where the offence is amerciable only, there the presentment is of itself conclusive, such amerciements being reckoned among those *minima de quibus non curat lex*. (a)

2 Hawk. P. C. c. 19, § 21. (a) Yet there are cases where these are traversable, or their truth called in question. Perhaps in all cases by removing them into B. R., or by pleading to actions brought on them for recovery of the amerciements; or where there is a distress and replevin.

It is held, by some opinions, that an inquisition taken by the coroner *super visum corporis* cannot be traversed; also, in respect to that high credit which the law gives to an inquisition found before a coroner, it hath been held, that if an inquisition finds that a person has been slain, and that J S hath fled, he forfeits his goods and chattels; the coroner's inquest being of that solemnity as not to be traversable.

But for this vide title *Coroner*, letter (D).

The probate of a will is not traversable; and herein it is settled that the ecclesiastical courts having the probate of wills, they, as incident to such jurisdiction, have power to determine all those matters that are necessary to the authenticating of such testament; therefore, if the seal of the ordinary appears, it cannot be suggested, or given in evidence in the common law courts, that the will was forged, or that the testator was *non compos*, or that another person was executor; for of these they had proper jurisdiction, and the remedy must be by appeal.

Roll. R. 226; 2 Roll. Abr. 299; Hard. 131; Raym. 406.

If the ordinary refuse a person presented to him for cause, such cause is traversable, and shall be tried by the metropolitan, if the party be living, but if dead by a jury; for though the bishop be judge in examining, yet, as his proceedings are not of record, the cause of refusal is traversable.

Dyer, 254; Goulds. 351; 3 Leon. 199; 5 Co. 57; but vide Show. P. Cases, 88; 3 Lev. 313.

[In debt on a bail-bond, the defendant traversed the arrest of the principal, and on demurrer judgment was given for the plaintiff; for otherwise this would be a way to avoid all bail-bonds that are civilly taken, without exposing the party by an arrest.

Watkins v. Barry, 1 Stra. 444; Hayley v. Fitzgerald, Ibid. 643, S. P.] [Vide as to traverse of officers, Tidd's Prac. 1101, 1102, (7th ed.)]

Though a traverse can be taken to a single point only, yet as that point may consist of a number of facts, the traverse need not be confined to a single fact, but may deny them all.

Strong v. Smith, 3 Cain. R. 160.

When several matters are alleged in the plea, which constitute one entire

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defence, and form one connected proposition, it is sufficient if the replication traverse the material allegation in the plea.

*Bradner v. Demick*, 20 Johns. 404; 1 M'Cord, 464.

When the *videlicet* is used to explain what goes before, and is consistent with the preceding matter, it is material and traversable.

*Gleason v. M'Vickar*, 7 Cowen, 42.

In an action against a collector of taxes and his sureties for not paying over money received by him, the averment in the declaration that it was received by him by virtue of a warrant issued and delivered to him, cannot be traversed, unless it be pleaded that he did receive, and had a right to receive the money by virtue of some other authority.

*Trustees of Rochester v. Seymond*, 7 Wend. 392.

An averment of the value of goods in a plea of *plene administravit* is not material nor traversable.

*Burr v. Baldwin*, 2 Wend. 580.

In a plea, an averment of acceptance by the plaintiff of money paid into court by the sheriff on a return of an execution, is material and traversable.

*Crane v. Dygert*, 1 Wend. 534.

Whatever is necessarily understood, intended, and implied, in a plea, is traversable, as much as if it were expressly alleged.

*Haight v. Holly*, 3 Wend. 258.

On a traverse of a material allegation, the other party is bound to take issue.

*Haggood v. Houghton*, 8 Pick. 451; *Dyer v. Stevens*, 6 Mass. 389; *Dawes v. Winship*, 16 Mass. 291.

To *assumpsit* on a promissory note a release was pleaded. The plaintiff replied a previous assignment of the note, that the action was prosecuted for the benefit of the assignee, and that the release was fraudulent and collusive. A rejoinder traversing the fraud and collusion was held bad, as tendering an issue on a matter of law.

*Rixford v. Wait*, 11 Pick. 339.

An issue in fact is not complete without a *similiter*, and the refusal on the part of the plaintiff to add a *similiter* will be a discontinuance of the action.

*Earle v. Hall*, 22 Pick. 102.

## 3. In what Cases a Traverse is necessary.

Herein it is laid down as a general rule, that where the matter alleged by the defendant in his plea is contrary to the matter set forth in the declaration, there must be a traverse or denial of such matter set forth in the declaration. So if the replication contradicts the matter alleged in the plea, &c., (a) as where the defendant alleges seisin in one from whom he claimeth, the plaintiff cannot allege seisin in another from whom he claimeth, without traversing, confessing, or avoiding the seisin alleged by the defendant.

Lutw. 381. [See 1 Will. Saund. 22, note.] *β* *Larned v. Bruce*, 6 Mass. 57; *Norton v. Sweet*, 15 Mass. 169; *Vermont Bank v. Porter*, 5 Day, 316. *γ* (a) *Cro. Eliz.* 30.

So if it be alleged by the defendant that the party died seised in fee, and the plaintiff allege that he died seised in tail, he must traverse the dying seised in fee, (c) because two affirmatives cannot make an issue.

5 H. 7, 11, 12; Doct. pl. 349; *Dyer*, 312 b, S. P. (c) *Leon.* 78, S. P. [See 1 Will. Saund. 22, and 209, note 8.]

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The omission of a traverse where necessary is matter of substance ; and therefore, where, in trespass for taking his horse, the defendant pleaded that he was seised of such lands, and entitled himself to a heriot ; the plaintiff replied, that another person was jointly seised with the defendant, *et hoc paratus est verificare* ; on demurrer it was adjudged for the defendant, because the plaintiff ought to have traversed the sole seisin.

2 Mod. 60, *Snow v. Wiseman* ; and vide *Cro. Ja.* 221, that the plaintiff having said enough in his case to avoid the bar, if he had traversed it also it would make his replication naught ; and vide 1 *Leon.* 43, 44, that a traverse is but matter of form, and the want thereof shall not prejudice the other party in point of judgment ; but the judges ought to judge upon the substance, and not upon the manner or form of pleading ; and vide title *Amendment and Jeofail*.

Where a man confesses and avoids he need not traverse ; but where, in *assumpsit* against the defendant as executor, he pleaded that the testator made J S executor, who proved the will, and took upon him the execution thereof, and concluded in abatement ; here, because he had not traversed, *absque hoc* that he was executor, or administered as executor, it was adjudged against him.

2 Mod. 168, *Singleton v. Bawtres*.  $\beta$  Where a replication confesses and avoids the material facts in a plea in bar, there cannot also be a traverse. *Oystead v. Shed*, 13 *Mass.* 520. $\gamma$

|| And where a party confesses and avoids his adversary's pleading, he ought not also to traverse ; for by so doing he deprives his adversary of the power of traversing the matter which confesses and avoids his title.

1 *Saund.* 209, n. 8.||

When a malfeasance is laid to the defendant's charge, he ought expressly to traverse it, and not to answer it by argument ; but in waste the defendant may say it was ruinous, without answering expressly to the waste ; so, in case of an innkeeper, he may allege a robbery, without traversing it was by his default.

*Cro. Eliz.* 281.

In debt for rent, the plaintiff declared on a lease of four acres of land at 5*l.* rent, and for rent arrear he brought the action : the defendant pleaded to part *nil debet*, and to the residue, that the lease was of the said four acres, and of one acre more, and that before the rent was arrear the plaintiff entered into the fifth acre ; on which the plaintiff demurs ; and the reason shown on the argument was, for that he did not traverse that he demised four acres. But on the other side it was said for the defendant, that the traverse ought to come on the plaintiff's part, viz., he ought in his replication to have maintained the lease in the declaration, and have traversed that he demised the fifth acre. To which it was answered, that that would be a departure from his declaration, and therefore the traverse ought to have been on the defendant's part ; for when he pleads another lease than that upon which the plaintiff declared, he ought to traverse the lease on which the plaintiff declared, viz., to plead the lease of the fifth acre, *absque hoc* that he demised the four acres only ; and so held the court and gave judgment for the plaintiff.(a)

*Sand.* 206 ; *Sid.* 405 ; *Raym.* 175 ; 2 *Keb.* 467 ; *Lev.* 263, *Salmon v. Smith*. || (a) But *Saunders*, in this case, thought the better pleading was, that the traverse should come from the plaintiff, and *Serjeant Williams* is of his opinion ; for the plea in fact confesses the demise in the declaration, but alleges a fact which avoids the effect of it. Therefore to add a traverse would be informal, and vitiate the plea on demurrer, according to the rule stated above. Vide 1 *Saund.* 209, n. 8 ; 2 *Saund.* 5, n. 3 ; *Ibid.* 50, n. 3.||

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In an action against a sheriff for an escape, the plaintiff declared, that the defendant being sheriff of Surrey voluntarily suffered J S whom he had in execution to escape; the defendant, protesting that he did not let him voluntarily escape, pleaded, that he took upon fresh pursuit. To which it was demurred; because he did not traverse the voluntary escape: and resolved for the defendant; it being impertinent for the plaintiff to allege it noways necessary to his action; and it being out of time to set it forth in the declaration, being a matter that ought to come in the replication. And *per* Hale, C. J.—It is like leaping before one comes to the stile; as, in debt upon a bond, the plaintiff should declare, that at the time of the sealing and delivery of the bond the defendant was of full age, and the defendant should plead *deins age*, without traversing the plaintiff's allegation.

Vent. 211, 217, Sir Ralph Bovey's case. Lutw. 381, S. C. cited; Latch. 200, S. P. adjudged; and vide Cro. Ja. 657.

But in debt by the gentlemen ushers of the king for a fee of 5*l.* due to them from one who had received the degree of knighthood, they declared, that time out of mind they had used to receive a fee of 5*l.* of every person who voluntarily and without compulsion had received the degree of knight, &c. The defendant pleaded, that he had taken the degree in sole obedience to the king; but because he had not traversed *absque hoc, quod def. recepit vel suscepit gradum militaris. voluntarie et sine compulsione*, it was adjudged for the plaintiff; for the voluntary acceptance of honour, without compulsion, is of the essence of the action, and not like the aforesaid case of an escape.

Lutw. 381, Duppa et al. v. Stephens.

In account against one as bailiff of a manor such a year, it is a good plea, that J S was his bailiff that year; but there he must traverse that he himself was not.

Dyer, 66 b, pl. 15.

So in escape against a jailer, he may plead that the prison was broken open by the king's enemies, or that it was burnt by sudden fire; but then he must traverse, that the escape was not in another manner, or as the plaintiff hath alleged.

Dyer, 66 b.

If in trespass the defendant entitles himself by the feoffment of a stranger, and the plaintiff replies and maintains that the same stranger did enfeoff him, this cannot be a good issue (a) without a traverse of the feoffment alleged to be made to the defendant.

Poph. 67. (a) That where the parties in pleading vary in the estate alleged, or in the quantity thereof, there ought to be a traverse. Yelv. 180. ¶ See 1 Will. Saund. 22, note (2).¶

In assault and battery the defendant pleads a special plea, and justifies; the plaintiff replies *de injuriâ suâ propriâ*; upon which issue is joined, and a verdict for the plaintiff; but in arrest of judgment it was held, that the replication was not good, in not answering the special matter pleaded, and traversing the *absque tali causa*, so that an issue might be joined on an affirmative and negative; and therefore the court ordered a replader.

Stile, 150, 198, 210. ¶ See Allen v. Crofoot, 7 Cowen, 46.¶

If in covenant for payment of money the defendant pleads that he was at Lisbon in Portugal at the day of the payment of the money which he had

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covenanted to pay, the plaintiff may reply that he was in England, without a traverse, *absque hoc*, that he was in Portugal.

Stile, 373.

If account be brought against two, and one of them plead *ne unques son receiver*, this is good without a traverse that he and his companion were receivers.

Godb. 43.

If in trespass for chasing his ewes, being great with lamb, so as by driving them he lost his lambs, the defendant justifies that they were damage-feasant, and that therefore he drove them to pound, &c.; this is naught without a traverse ;(a) for though he might take and drive them to pound, yet this should have been without any prejudice to them, and was therefore a matter traversable.

3 Leon. 15. (a) Instead of a traverse he should have pleaded he drove the ewes gently, doing as little damage as he could, and there would not have been any occasion for a traverse; nor do I see what traverse could properly have been taken. ¶Such a traverse would certainly have been improper and demurrable. The plea justified that which was the gist of the trespass, and the plaintiff might now assign for excess in the manner of driving the ewes.¶

If there are two prescriptions, one pleaded by the defendant by way of bar, the other set forth by the plaintiff in his replication, without any traverse of that which is alleged in bar, this is naught.

2 Leon. 209, that one prescription pleaded against another is not good without a traverse, vide Yelv. 217; 9 Co. 59; 2 Mod. 104; Carth. 116.

As where in trespass for cutting oaks the defendant pleads that he was seised of a messuage in fee, and prescribes to have *rationabile estoverium ad libet. capiend. in boscis*; the plaintiff replies, that the *locus in quo* was within the forest, and that the defendant and all those, &c., *habere consueverunt rationabile estoverium, &c., per liberationem forestarii*; upon a demurrer, the replication was held naught; because the plaintiff ought to have pleaded the law of the forest, viz.: *lex forestæ talis est*, or to have traversed the defendant's prescription, and not to have set forth another prescription in his replication without a traverse.

2 Leon. 209, 210, Russel v. Broker.

¶The modern practice in such a case is to traverse the defendant's prescription, according to the rule now settled, that wherever a material fact is alleged in pleading, which will, on issue joined upon it, decide the cause one way or the other, if the adverse party plead a fact inconsistent with it, he must traverse it. In the above case the plaintiff's allegation, that the defendant's prescription was to have reasonable estovers by the assignment of the forester, was inconsistent with the prescription stated by the defendant, to have reasonable estovers to be taken at pleasure; the plaintiff ought therefore to have traversed the defendant's prescription, either with a formal inducement of the prescription alleged by the plaintiff, or, according to the shorter modern form, by merely denying the matter of the plea, and concluding to the country, and the issue on such traverse must have decided the cause.

1 Saund. 22, n. 2.¶

In trespass for pulling down his hurdles in his close, the defendant justified that J S was lord of the manor of D, and that the said J S, and all those whose estate he had in the said manor, had a free course for their sheep in the place where, &c., and that the tenant of the said close could not there

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erect hurdles without the leave of the lord of the manor, and that the said J S let to the defendant the said manor, and because the plaintiff erected hurdles without leave, &c., in the said close, he threw them down, as it was lawful for him to do: the plaintiff replied of his own wrong, without cause, &c., and it was held an ill replication, because the plaintiff had not traversed the prescription.

4 Leon. 16, *Ruishbrook v. Pusanies*.

4. *Whether there may be a Traverse upon a Traverse.*

It is laid down as a general rule, that there cannot be a traverse upon a traverse; because that in all pleadings whereupon a traverse is properly taken, the issue is closed; (a) and therefore a traverse cannot be taken on a traverse, for a traverse must be of a material point; and if to the declaration, it destroys the plaintiff's action; if to the bar, it destroys what is said in avoidance of the action; and if to the replication, what was said in avoidance of the bar, *et sic de cæteris*; and, consequently, a subsequent traverse will be insignificant; because (b) when a material traverse is taken the rest stands confessed.

Co. Lit. 289; Hob. 104; 11 Saund. 22, n. 2; Hutt. 97; Saund. 20, 22; Vaugh. 62; 1 Johns. 216; Cro. Car. 105. (a) *Vide antè*. (b) That whatever is traversable and not traversed is admitted.† Salk. 91.—† This is avoided by protesting against every thing the party does not mean to admit: though the protestation does not put the adverse party to prove what is so protested against, where issue is taken on another point; but the protestation operates as an exclusion of a conclusion; or, in other words, the record cannot, as to the points protested against, be used as evidence against the party protesting, as to those points; because by protesting he has denied them. Had he not protested, those points might, perhaps, as between the same parties in *another* suit relative to the same matter, be considered as admitted: and the party protesting might in such subsequent cause find it necessary to offer an issue on some point that came under the *protestando* in a former cause. ¶ As to a *protestando*, see 2 Will. Saund. 103, note.]

This rule is thus laid down by my Lord Hobert, that regularly, whensoever a traverse is taken apt and material to the plaintiff's title, the plaintiff is bound to it, and cannot for the same thing leave it, and force the defendant to accept another traverse tendered by him.

Hob. 104.

But if a man bring an action of trespass for breaking his close on a certain day, if the defendant plead a release of actions, he shall traverse all trespasses after; if a feoffment, he shall traverse all trespasses before; if a license for once, all before and after: and in these cases the plaintiff hath it in his choice to leave the traverse, and traverse the point of justification, *ss.* the release, feoffment, or license; or he may allege a trespass before or after, and so join upon the traverse offered, which is traverse after a traverse, but yet is not, according to the rule, a traverse upon a traverse to the self-same point.

0 H. 4, 2; 12 E. 4, 6; 2 Rich. 3, 9; Hob. 104. ¶ *Vide* Co. Lit. 282 b.]

So if a man bring an action of waste for the felling of trees, and lay that the lessee felled and sold them, and the defendant confess that he felled them, but say, that he bestowed them in repairing the house, *absque hoc*, that he sold them; the plaintiff may reply that he let them rot, or any like case of waste, *absque hoc* that he employed them in reparations; and though this be a traverse upon a traverse, and directly to the same thing, yet it is out of the above-mentioned rule, because the traverse in this case was not



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material; for the plaintiff might have declared of the selling only, and the other point was mere surplusage.

Hob. 104.

¶ Whenever the traverse is not on a material point, the other party may either pass it by and tender another traverse, or may demur specially for that cause.

1 Saund. 22, n. 2, and cases there cited.¶

If assault and false imprisonment be laid in London, and the defendant plead a special justification in (a) another county, with a traverse or *absque hoc*, &c., the plaintiff may maintain his action, and traverse the special matter alleged by the defendant, though this be a traverse upon a traverse; for as the matter alleged by the defendant may be false, it would be unreasonable by such falsity to oust the plaintiff of the liberty the law gives him, of laying his action in the proper county where the cause arises.

Poph. 107; Cro. Eliz. 418; ¶Co. Lit. 282 b;¶ Moor, 350, S. C., Paramor and Verard; 2 Lutw. 1437, S. C. cited and like point adjudged; Cro. Eliz. 99, S. P. adjudged. (a) There never shall be a traverse upon a traverse, but where the traverse in the bar takes from the plaintiff the liberty of his action for the place or time, or such like; for there the plaintiff may maintain his action for the place or time, and may traverse the inducement to the traverse, and needs not to join with the defendant in the traverse, but at his pleasure may do the one or the other: but, when the inducement is made and concluded with a traverse of a *title* shown by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse. Cro. Car. 105; 2 Lutw. 1630, S. P.

In trespass, the defendant justifies his entry by the command of J S. Plaintiff replies, and shows that J S was seised in fee, and let unto him at will, and traverseth the command of J S. The defendant maintains his plea, that J S commanded him to enter, and that he entered by his command, and traverseth the lease at will; and it being hereupon demurred, it was adjudged for the plaintiff that the command is traversable, and that therefore the defendant's rejoinder to make a traverse upon a traverse is not good.

Cro. Car. 586, Thorn v. Shering.

Where one traverses a thing which he had before confessed and avoided, this is merely form, and aided upon a general demurrer: for the other party might traverse that traverse, (b) and also the inducement to it.

¶1 Saund. 21, n. 1;¶ Carth. 166; 2 Lutw. 1632. ¶(b) This language is inaccurate—a traverse cannot be traversed. In such case, the party may either *specially* demur, or pass the traverse offered and traverse the *inducement*.¶

Where to an indictment for not repairing a bridge the defendants plead that A B ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves; the attorney-general in this special case may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against A B, and an issue ought to be taken on such second traverse; and the attorney-general may afterwards surmise that the defendants are bound to repair it, and then the whole matter shall be tried by an indifferent jury.

2 Lev. 112; Sid. 140; Hawk. P. C. c. 77, § 5. ¶See Rex v. Ecclesfield, 1 Barn. & Ald. 348; and 1 Will. Saund. 23, note.¶

So, though regularly a common person cannot take a traverse upon a traverse, yet the king by his prerogative may, upon a title disclosed in the traverse of the party, desert his own title, and take a traverse to such matter disclosed, though this be a traverse upon a traverse.

Vaugh. 62, 64; Mod. 280; Standf. 64; for this vide tit. *Prerogative*.

In debt on an obligation conditioned to appear on a bill of Middlesex,

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returnable *die Sabbati prox. post quinden. Pasch.*, the defendant pleads, that he was arrested on a bill returnable *die Veneris*, and pleads the statute of 23 H. 6, c. 9, and that the bond was given for ease and favour. The plaintiff replies, that he was taken on a bill returnable *die Sabbati*, and not *die Veneris*. The defendant rejoins, that he was taken by virtue of a bill returnable *die Veneris, absque hoc*, that he was taken by virtue of a bill returnable *die Sabbati*; on which the plaintiff demurred: and it was argued, that the rejoinder was ill, and a traverse upon a traverse; for when the plaintiff replied, that he was taken by a bill returnable *die Sabbati et non die Veneris*, the *et non die Veneris* was a traverse whereon the defendant might have joined and taken issue. On the other side it was argued, that the *et non* was not any traverse, at least not a formal (a) traverse, or such as the books mention, that a traverse cannot be taken on a traverse; and to have joined issue on the *et non die Veneris* would have made an immaterial issue; for it matters not whether he were taken by virtue of a bill returnable *die Veneris*, or not; for if he were not arrested on a bill returnable *die Sabbati*, the bond is void by the statute; but if he were taken on a bill returnable *die Sabbati*, it is good, for that only is traversable and triable; and so held the court.

Lev. 192; Saund. 20, 21; 2 Keb. 94, 105, S. C., *Bennett v. Pilkins*. [(a) It seems the court did not pay much regard to this objection. 2 Saund. 22.]

In debt upon a specialty for 200l., which was to this effect, ss. *The defendant did declare from his heart before God, that he had taken the plaintiff to be his wife, as she had taken him for her husband; and the more to confirm the said plaintiff, that he had no design but to perform his promise aforesaid, he (the said defendant) obliged himself by the same deed to pay unto the plaintiff 200l. if he should happen to be so base as to be worse than his word; and that if he did not pay it when demanded, she (the plaintiff) should have good right to sue and recover it by law, &c.* The breach assigned was, that she had tendered herself to marry the defendant, but that he refused, and afterwards married another woman, *per quod actio accrevit*. The defendant pleaded, that he, after the making of the aforesaid writing, *obtulit se* to marry the plaintiff, and she refused; *absque hoc*, that he refused to take her for his wife before she had refused to take him for her husband. (b) The plaintiff replied, that she tendered herself to marry the defendant, and he refused, *absque hoc* that the defendant offered himself to marry the plaintiff; *et hoc, &c.* And upon a demurrer to this replication it was insisted for the defendant that the traverse in it was ill, because she had traversed that which was the inducement of the traverse in the bar, so that it is a traverse upon a traverse, which the law will not allow; besides, the words of this deed are *in presenti*, and not executory, but declaratory of an act executed. On the other side it was argued that the words in this deed are sufficient to create a contract, and that of the highest nature, for God is called as a witness to it; and these words cannot import any other sense but only a contract to marry the plaintiff: that the traverse in the bar is ill, because it is too large, for the defendant had traversed more than was alleged in the declaration; ss. *absque hoc*, that he had refused to take the plaintiff for his wife before she had refused to take him for her husband, so that he intended to make this circumstance of time parcel of the issue, whereas there is no such circumstance alleged in the declaration, nor any affirmation that the defendant had refused before the plaintiff had refused; and therefore, because the traverse in the bar was idle and frivolous, the

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plaintiff might well traverse the substance of the matter of the bar; and of this opinion was the court, as well to the pleading as to the matter in law.

Carth. 99, 100, *Crosse v. Hunt*. ¶(b) This traverse is bad, because it is taken on matter not before alleged nor necessarily implied. Such a traverse, however, seems only form, and must be specially demurred to; see 1 Will. Saund. 313 d, note 4. Serjeant Stephen, in his valuable work on pleading, observes on this case, that the plea ought to have been in confession and avoidance, stating merely the affirmative matter, that, before the plaintiff offered, the defendant offered, and the plaintiff refused him, and omitting the *absque hoc*. Stephen on Plead. p. 217.¶

[In trespass for fishing in the plaintiff's fishery, the defendant pleaded that the place in question is an arm of the sea in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right: the defendant in his rejoinder insisting upon the general right, traversed the prescriptive right claimed by the plaintiff. The Court of K. B. held, that the defendant ought to have taken issue on the traverse in the replication, and not to have traversed the prescriptive right claimed in the replication, for that the first traverse was a material one, and put in issue the true question in dispute between the parties. But this judgment was reversed in the Exchequer Chamber. For the first traverse was of the right of *all* the king's subjects to fish in an arm of the sea, stated by the defendants; but this was clearly a bad and an immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved that it was the separate right of others, and not of the plaintiff, the issue must have been found for the plaintiff, not only without his being obliged to prove either possession or right, but where in fact he had neither possession nor right. An immaterial traverse may be passed over, and the matter of the inducement traversed; which had been properly done by the defendant in this case.

Mayor, &c. of Orford v. Richardson, 4 Term R. 437; 2 H. Black. 182.

In prohibition for that the defendants had petitioned the Court of Common Council, complaining of an undue election of the plaintiff as a common councilman, which court had no jurisdiction therein, the jurisdiction belonging to the court of mayor and aldermen, the defendant pleaded, that the common council have the jurisdiction, *absque hoc*, that the jurisdiction is in the court of mayor and aldermen: the plaintiff replied that the common council have it not, and concluded to the country. The defendants demurred, and showed for cause, that the replication is a departure, and that the plaintiff ought to have taken issue on the traverse. But *per curiam*.—The traverse is immaterial; for what is the ground of sending a prohibition? Not because the court of aldermen have a right, but because the common council have none; and therefore the traverse, which would avoid trying the right of the common council, and bring that of the court of aldermen in question, is immaterial. And where the first traverse is immaterial, that is, where it will not put the proper point in issue, there may be a traverse upon that traverse.

King v. Bolton, 1 Stra. 1117; 1 Bro. P. C. 98, S. C.

In *quare impedit* by the king, for the next turn of a living void by promotion, the defendant pleaded, that the crown presented D, who is since dead, and that he himself is parson imparsonnee, and concluded with a traverse that the church is still vacant by the promotion. This plea is a full confession and avoidance, without the traverse; which for that reason is immaterial, and therefore may be passed over.

Rex v. Archbishop of Armagh, 2 Stra. 837.

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In *quare impedit* the plaintiffs entitled themselves to the avowson in question, as executors and devisees in trust under the will of Caleb Lomax, whom the declaration stated to have been seised in fee of the advowson, and to have presented on a former avoidance. The defendant in one of his pleas stated a title to the advowson in one Ellis, who presented in 1680; that Ellis conveyed it to Killigrew; that Killigrew devised it to his wife Lucy for her life; and that the reversion on the death of Killigrew descended to his three daughters in coparcenery. It then stated an avoidance during the life of Lucy the widow, and a presentation by Lomax the father of the testator, usurping on Lucy. It then stated, that the living again became vacant after the death of Lucy, by the resignation of the then incumbent Romney, and that the crown by usurpation on the right of the eldest coparcener presented again the same clerk. It then stated an avoidance by the death of that presentee, and another presentation on that evidence by Lomax, usurping on the right of the second coparcener. A title was then deduced at considerable length to the defendant from the second and third coparcener, concluding with a claim to present on the existing vacancy, in the third turn. The replication to this plea stated a purchase by Lomax of the right of Lucy the widow, and a presentation to the advowson made by him during the life of Lucy, on an avoidance then happening. It then set forth a fine, levied by the three coparceners of the advowson, and a conveyance to Lomax under that fine; and concluded, that the resignation of Romney was fraudulent and without notice, and traversed, that upon that resignation it belonged to the eldest coparcener to present. In the rejoinder to this replication the defendant traversed the fine; upon which the plaintiff demurred specially, alleging as a defect in the rejoinder that there was a traverse upon a traverse. But the court held, that the traverse in the replication was an immaterial traverse, and being such, the defendants were at liberty to pass it by; and therefore the rejoinder was good.

*Thrale v. Bishop of London*, 1 H. Black. 376.]

5. *To what Point the Traverse shall be taken; and therein, what Matters are traversable, and of the Manner of taking thereof.*

Herein the general rule is, that the traverse must be taken to some material point alleged by the adverse party, which, if found for him who takes it, absolutely destroys the adverse party's right, by showing that he hath none in manner and form as he hath alleged; and being to the (a) principal point alleged puts an end to the matter.

2 Saund. 5, 28; 6 Co. 24 a; Roll. R. 235; Carter, 217; Lane, 18. (a) A traverse should be always of such part, as, if found for the defendant, destroys the plaintiff's action. Comb. 321. β A material fact in the bar must be traversed, it cannot be avoided by the allegation of a collateral fact. Larned v. Bruce, 6 Mass. 57; 15 Mass. 169.g

If in covenant on a charter-party the plaintiff declares, that upon the ship's going with the next fair wind, &c., he, the defendant, should pay so much; the defendant by way of traverse says, that the ship did not go with the first fair wind; this is an ill traverse, not being to the principal point, or gist of the action, which is the going of the ship, and not the nature of the wind.

Poph. 161; Latch. 12; Noy, 75; Bendl. 116; Palm. 397, S. C., *Constable v. Clobery*.

A traverse must be taken to some matter alleged; and therefore where in false imprisonment the defendant justified by process out of an inferior court, and the plaintiff replied, that the cause of action accrued out of the jurisdic-

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tion, *absque hoc*, that it accrued within the jurisdiction, the traverse is ill, being of a matter not alleged before; but it was held, that this being only an immaterial traverse, no advantage could be taken of it on a general demurrer, and that then the residue of the replication should stand good.

Lutw. 935, 1560. [See *antè*, p. 564, note (a).]

If any thing in the count be traversed, it must be such part as, if true, is consistent with the defendant's title, and if false, or found against the plaintiff, doth absolutely destroy his title; nay, if the traverse leaves no title in the plaintiff, then it is good, whatever comes of the defendant's.

Saund. 21; Vaugh. 3; Show. Parl. Ca. 220, 221.

In a *scire facias* against A and his wife, reciting, that the wife *dum sola fuit* recovered in the King's Bench, in an action upon the case, 26*l.* 13*s.* 4*d.* for damages and costs, and had execution of these damages, and is thereof possessed; and whereas afterwards the said judgment was removed by writ of error into the Exchequer-chamber, and there reversed, and restitution awarded; and afterwards she took the said A to husband: The plaintiff thereupon brought this writ to have restitution. The defendant pleaded, that after the reversal had, and before the purchase of this writ, he paid to the plaintiff the said debt and costs of 26*l.* 13*s.* 4*d.*, *absque hoc*, that they are *possessionati* of the said money *proul*: And upon demurrer the plea and traverse were both held ill; and, 1*st*, Three judges held the plea ill, because it is grounded and affirmed against a record; for a payment being against matter of record cannot be a discharge, unless by a matter of record. 2*dly*, Admitting it a good plea, yet it is ill as pleaded; for he doth not rely upon it, but traverseth that which is not material, viz.: *absque hoc*, that he is *possessionatus*, &c., which was idly alleged, and not material or traversable; and by this traverse he waives his pleading of the payment, which being (a) specially shown for cause of demurrer, the demurrer is good: but Berkley held, that payment had been a good plea, if he had relied thereupon; because he avers, that thereby the party is satisfied; and that in divers cases matter in fact may be pleaded in discharge; as, in debt upon an escape, he may plead that the plaintiff commanded him to let him out of execution, and such like, &c., but as to the traverse he conceived it ill; and therefore agreed with the other justices, that judgment should be given for the plaintiff.

Cro. Car. 328; Vezey v. Harris et ux. (a) That an immaterial traverse is aided by 27 El. c. 5, unless it be specially demurred to. Dyer, 366; Yelv. 151; Co. Ent. Cro. Ja. 505; 2 Lutw. 221.

In trespass and ejectment the defendant pleads that the plaintiff disseised J S of the land and then made a lease of it to him, and that afterwards the land descended to the plaintiff; the plaintiff replies, that he was seised of the lands, and traverseth the disseisin on J S: and on demurrer, for that he ought to have traversed the descent, and not the disseisin, it was held by Rolle, C. J., that the traversing the disseisin makes an end of all, and was therefore well taken, being the most material matter, although the descent might likewise have been traversed.

Style, 344, Wood v. Holland.

Trespass upon the case was brought by bill in the King's Bench, that the defendant's father held of him such lands by knight's service, and died in his homage, his heir within age, and that he tendered unto him a convenient marriage, and shows what, &c., and demanded of him the value of

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the marriage, &c. The defendant *protestando* to the tenure, *pro placito* traversed the tender, &c.; and hereupon the plaintiff demurred: And it was resolved that the plea was ill, for the tender is not traversable. (a)

Cro. Car. 502, *Arundel v. Sanders*. (a) Why was not the tender traversable if taken in the words of the declaration; as, if the marriage tendered was not convenient or proper, how could the plaintiff be entitled to recover?

If the plaintiff in his replication sets forth a grant of copyhold lands such a day, and by such a seneschal; and the defendant by way of rejoinder maintains his bar, and traverses the grant to the defendant the said day, and by the said seneschal, the traverse is ill; for the principal point is the grant, which may be at another court and day, and by another seneschal, and yet good. (b)

Yelv. 122, 123, *Lane v. Alexander*. (b) He might have traversed the grant, in manner and form, &c.; ||for these words only put in issue matter of substance. Com. Dig. Plead. (G) 1; Chitt. on Plead. 470; Stephen on Pleading, 214.]

If a feoffment by deed such a day be pleaded, there can be no traverse to the day, because the estate passes by livery, and not by the deed.

A difference hath been taken between pleading a feoffment and a grant of a particular estate; that in the first case, if the other will entitle himself by an elder feoffment, he ought to traverse, but not in the last case; because a man may come to a fee-simple by divers means, viz.: by disseisin and tort, or by lawful means; and therefore, when one entitles himself to a particular estate by an elder grant, he shall not traverse the last grant, but shall compel the other to show by what title he claims it after the elder grant. (c)

6 Co. 24, 25; Cro. Eliz. 650; Moor, 551; *Helyar's case*, 2 Vent. 212, S. C. cited, and held to be only form, and aided by the 27 Eliz. c. 5. (c) The party having the elder grant may confess the other, and avoid its effects by showing his own; and if made by a different grantor, he should show that before such other grantor had any thing in, &c., his grantor was seised, &c., and made such elder grant.

A man pleaded a descent of a copyhold in fee; the defendant, to take away the descent, pleaded, that the ancestor did surrender to the use of another, *absque hoc*, that the copyholder died seised: and the opinion of the court was, that it was no good traverse; because he traversed that which needed not to be traversed; for being copyhold, and having pleaded a surrender of it, the party cannot have it again, if not by surrender, as in *Helyar's case*, *suprà*: for as none can have a lease for years but by lawful conveyance, so none can have a copyhold estate if not by surrender.

Marc. 21.

In trespass, the defendant pleads, that A was seised, and enfeoffed B, who enfeoffed C, who enfeoffed D, whose estate the defendant hath; in this case the plaintiff may traverse which of the feoffments he pleases.

Doct. pl. 365; 6 Co. 24, S. P., and that where there are several material things alleged, it is in the election of the party to traverse which he pleases.

If in trespass or case the plaintiff declares that J S was seised in fee, and made a lease to him, and the defendant pleads that J N was seised in fee, and leased to him, &c.; this seisin of J N shall be intended by disseisin, for he ought to have traversed the seisin of J S, and said, that long before such a one was seised, &c.

Sid. 227, *Palm v. Fleshes*.

In trespass the defendant pleads, that long before the trespass one James Stephens was seised in fee, and 12 Eliz. enfeoffed Thomas Norwood to the use of James Baker and Mary his wife, and the heirs of their bodies; and

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that they had issue Henry Baker, and died seised, which descended unto him, and from him to his three daughters, and justifies by their lease, and gives colour to the plaintiff: the plaintiff replies, that long time before the trespass Sir Thomas Tyrrel was seised in fee, and gave it to Edward Baker and Joan his wife, and the heirs male of their bodies, and that they had issue the said James Baker and the plaintiff; and that James had issue Henry, and died, which Henry died without issue male; wherefore he as heir-male entered, and that the defendant committed the trespass, &c., and traverseth the seisin in fee alleged in James Stephens; whereupon the defendant demurs, and shows that he traversed the seisin in fee of James Stephens, whereas he ought to have traversed the gift in tail, which is the principal matter of the bar; but the court held that it was in his election to traverse the one or the other.

Cro. Ja. 681; 2 Roll. R. 362, S. C., Baker v. Blackman.

Where by the (a) inducement or conveyance to the action the defendant is ousted of his (b) law, there the defendant may as well traverse the conveyance as the gist of the action.

Dyer, 121 b; Leon. 252, S. P. (a) But where a disseisin is alleged by way of conveyance to the title or possession of the plaintiff, it need not be traversed. Dyer, 635 b, pl. 34. (b) Where the conveyance to the action is that which doth entitle the plaintiff to the action, it may be traversed if the defendant cannot wage his law; otherwise where he may wage his law. Cro. Eliz. 169, 201, S. P.

In *assumpsit*, supposing that such a day 4 Jac. upon an account betwixt them, the defendant was found in arrear in such a sum, and assumed to pay, &c.; the defendant pleads that such a day 4 Jac. they accounted, and then he was found in arrear such a sum as the plaintiff supposed, and that the same day he made an obligation for the payment thereof, and traverseth that any other day after the obligation made they accounted together *prout*, &c., and it was thereupon demurred; for that the account (which is the cause of the *assumpsit*) is not traversable, nor the time, for it is but an inducement and conveyance to the action: but the court held, that the account which was the ground of the promise was well traversable; wherefore it was adjudged for the defendant.

Cro. Ja. 234; Yelv. 171; Bulst. 16, S. C., Dalby v. Cook.

In *assumpsit* upon a promissory note, the defendant pleaded the tender of a certain sum in full of the plaintiffs' demand, being less than the sum appearing due from the face of the record, the plaintiffs should have traversed the sufficiency of the tender; otherwise the plea will be good on demurrer.

Vermont Bank v. Porter, 5 Day, 316.

It is said that the consideration of a promise is never traversable, nor allowed to be traversed, but it is the promise itself which is traversable. But herein a (c) difference is taken between a consideration of a promise which is executed and a consideration which is executory; that the one is not traversable, but the other is.

Cro. Eliz. 201; Roll. R. 43, 401; Carth. 82. (c) The difference between a promise upon a consideration executed and executory is, that, in that executed, you cannot traverse the consideration by itself, because it is passed and incorporated, and coupled with the promise. Hob. 106. ¶ The consideration of an agreement by simple contract is now seldom or never specially traversed, because the general issues of *nil debet*, and *non assumpsit* put in issue this, as well as every other part of the agreement declared on; and see tit. *Assumpsit*, vol. i.

In trover and conversion, the conversion is traversable; for it is the sub-

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stance of the action, and the tort supposed in him, and so may well be traversed ; for if one finds goods, but doth not convert them, no action lieth.

Cro. Eliz. 97, *per Coke* ; [but for this vide tit. *Trover*.]

[In debt for an annuity, it appeared upon oyer of the deed, that the defendant covenanted to pay it, (if the same were personally demanded by the plaintiff,) whereupon the defendant traversed the demand. The plaintiff demurred : and *per curiam*—The grant is substantive, and so is the covenant substantive, and the demand in this action is not traversable, whatever it might have been if an action had been brought upon the covenant ; but we think it would not be traversable in that case, as it is contained in a parenthesis in the deed.(a)

Hope v. Colman, 2 Wils. 221.] [(a) And where a by-law imposed a penalty and enacted that if any offender refused to pay it, he should be liable to an action of debt, it was held unnecessary to prove a demand, although alleged in the declaration. *Master, &c., of the Butcher's Company v. Bullock*, 3 Bos. & Pul. 434. But where the sum is not a precedent debt or duty, but a mere collateral sum, as the penalty of a bond, or a sum agreed to be paid on non-performance of an award, there a demand is necessary to be averred, and is consequently traversable ; for the bond is not forfeited, or the sum due on the award, till demand. 1 Saund. 32 ; *Carter v. Ring*, 3 Camp. 459 ; and see 1 Chit. on Plead. 322, 323.]

In debt on an obligation of 100*l.* dated 12 *Julii*, 10 Car. 1, with condition for the payment of 58*l.* at the end of six months, the defendant pleads the statute (21 Jac. 1, c. 17) of usury : the plaintiff replies that he lent the 50*l.* for a year, and that the defendant should pay 8*l.* for the forbearance for a year, and that, by the scrivener's mistake, it was made payable at the end of half-a-year : the defendant rejoins, that the lending was only for half-a-year, and that he was to pay for it 8*l.* at that time ; and traverseth, that upon the said 12th July, it was agreed the loan should be for one entire year, or that he should forbear it for a whole year. It was held, that this traverse in the rejoinder, making the day parcel of the issue, was ill ; and that the agreement only was traversable.

Cro. Ja. 501, *Nevison v. Whitley*.

In trespass for goods carried away, or battery, or false imprisonment, if the defendant plead that he is not guilty in the manner as the plaintiff supposes, and it be found that he is guilty at another day, or in another town or county than the plaintiff supposes, yet he shall recover ; for in transitory actions the defendant shall not traverse the county or town where the fact is laid, without some special cause of justification, which is so local that it cannot be alleged in another place ; as, where a constable of a town in another county arrests a man for a breach of the peace, in which case, if an action be brought against him, he shall traverse the county, and all other places, saving the town whereof he is constable : (b) so, where the defendant justifies for damage-feasant, &c.

Co. Lit. 282 ; *Style*, 382 ; *Leon*. 39 ; 2 *Leon*. 79 ; *Roll. R.* 265, 395. (b) *Cro. Eliz.* 677, *S. P.* adjudged. [In such cases the averment of *quæ est eadem*, seems not a sufficient traverse of the place in the declaration ; the safest way seems to insert the traverse, and omit the *quæ est eadem*. See 2 *Will. Saund.* 5 e, note.]

In false imprisonment for imprisoning him at Bristol, the defendant justifies, for that he arrested him at Gloucester by virtue of a commission of rebellion, *absque hoc*, that he was not guilty at Bristol ; and it was moved that the traverse was not good, the cause of justification not being local, and therefore he might have justified in that place where the action was brought ;



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otherwise if the commission had not been to arrest him at Gloucester; and of this opinion was Wray.

Cro. Eliz. 184, *Cowleigh v. Edwards*. || *Cowper*, 162, 1 *Saund.* 297; and vide *Serjt. Williams's* note as to traverses of time and place in the declaration. 2 *Saund.* 5, note 3.]

In trespass for an assault and battery laid in London, the defendant pleaded, that the plaintiff entered into his house in Waltham in the county of Essex, and that he *molliter manus imposuit* to put him out of his house, *absque hoc*, that he is guilty *extra* Waltham; and this was held a good traverse, the cause of justification, viz.: the defence of his house, being local; *secus*, if the justification had been personal and transitory, and such as might have been alleged in any place; || for where the justification is transitory it is a rule that the plea must follow the place in the declaration.]

Cro. Eliz. 705, *Peacock v. Peacock*; || 1 *Saund.* 247.]

In trespass laid *apud* Edinbridge in *comitat. Cant.* for killing his dog, the defendant pleaded that J S was seized in fee of a warren in D in the same county, whereof he is and then was warrener, and that his dog was divers times killing conies there, and therefore, finding him there *tempore quo*, &c., running at conies, he there killed him, *absque hoc*, &c., that he is guilty *apud* Edinbridge *prout*, &c. And on demurrer it was objected, that he had traversed the place only, &c., and had not traversed all other places; but the court held that the traverse was good, his cause of justification being local, and that he needed not allege any more than that place.

Cro. Ja. 44, 45, *Wadhurst v. Damme*; || *sed* vide 2 *Will. Saund.* 5 b.]

Trespass of assault, battery, and wounding in London; the defendant justifies in the county of Norfolk, by virtue of a warrant from the sheriff of Norfolk, upon a writ of *latitat, quæ est eadem transgressio*, &c., *absque hoc*, that he is guilty in London, *vel alibi extra comitatum Norf.* On demurrer one objection was, that he had justified and also traversed, which he ought not to have done; but the court held it well enough; for the justification being in another county, the county wherein the action is brought ought to be traversed; and the plaintiff may maintain the action and issue, if he will, or he may traverse the defendant's plea at his election.

Cro. Ja. 372, *Bateman v. Woodcock*; Cro. Eliz. 868, S. P. adjudged.

If a man bring an action of trespass for breaking his close on a certain day, if the defendant plead a release of actions, he shall traverse all trespasses after; if a feoffment, he shall traverse all trespasses before; if a license, all before and after.

Hob. 104; *Carter*, 207; *Sid.* 293, 294; *Sand.* 14; *Lev.* 241, 307; 2 *Mod.* 68. That where the justification goes to a time and place not alleged by the plaintiff, there must be a traverse of both. || Unless it is necessary to the justification to mention a particular time and place, the general rule is to follow the time and place in the declaration. Where it is material to state the true time, if it varies from the day in the declaration, the day must either be traversed, or the defendant must conclude his plea with an averment "*quæ est eadem*," that the trespasses in the plea are the same with those in the declaration; but defendant must not do both, or the plea will be bad on special demurrer. See 1 *Will. Saund.* 81 a, *notis*, and 2 *Will. Saund.* 5 b, *notis*. Where the defendant's justification is local, (being confined to a certain manor or district,) there he must in his plea traverse the place in the declaration, and all other places except the manor, &c., or the plea is bad on special demurrer; and the averment of *quæ est eadem* is not held a sufficient traverse of the place, as it is of the time, in the declaration, though there seems no good reason for the distinction. See *Benjamin v. Howell*, 1 *Wills.* 81; 1 *Will. Saund.* 85; 2 *Will. Saund.* 5 e, *notis*.]

In trespass laid to be done 1 *Maii*, the defendant pleads a release made

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to him 1 Junii, and traverses, *absque hoc*, that he was guilty at any other time after the 1st of June; and this was held an ill traverse; for the day not being material in trespass, he ought to have traversed, *absque hoc*, that he was guilty before or after 1 Junii.

3 Buls. 209; Roll. R. 406, S. C., *Amson v. Walcott*. [Vide 2 Saund. 5, n. 3; 1 Saund. 14, 78, 79, 82, n. 3.]

If in trespass for entering a house the defendant says, that it was the freehold of J S, and justifies 27 Eliz., a year before the trespass supposed, and traverses the time before 27 Eliz. but says nothing as to the time after; yet the traverse is good; for when he pleads his freehold, or the freehold of another, it shall be intended so to continue, unless the contrary be shown, and therefore no need of traversing the time after.

Cro. Eliz. 87, *Higham v. Reynold*.

Herein also this difference hath been agreed, that where a general action is brought, in which the time is not material, there, upon a traverse to the fact charged upon the defendant, he must add *absque hoc*, that he was guilty either before or after; but where the thing traversed is not to the point of the action, (though the case may be so, that if it happen before or after the action might have laid,) the party need not add *absque hoc*, that he did it before or after, and this whether the traverse comes in of the plaintiff's part or the defendant's.

Sid. 234; Keb. 680, 822.

In case upon several promises, the statute of composition of two-thirds was pleaded in bar; but the plaintiff showed the contract to have been since the time of the statute, which the defendant did not traverse in his plea, as he ought to have done; and therefore judgment was given for the plaintiff; for if you vary from the time in the declaration, and make such variance material, you ought traverse the time in the declaration.

7 Mod. 16, *Beverly v. Pim*.

Trespass and imprisonment laid the first of May, 17 Car. 2. The defendant justifies as sheriff of Coventry, to arrest him for a breach of the peace made upon him in the execution of his office, for which he arrested him, and carried him before the mayor; and traversed all the time before he was sheriff, or afterwards; and the traverse was adjudged good, though it was objected to be too large. (a)

[Vide note *supra*.] Lev. 216, *Law v. King*. (a) If the traverse be taken more narrow than it need, being to the prejudice of the party, no jeofail. 2 Lev. 81.—But where the traverse contains more than is alleged in the breach, it is not good. 3 Lev. 167. [The traverse must not be too narrow, but must go far enough to destroy the substance of the opposite pleading. Therefore where a defendant avowed for 120*l.* rent, and the plaintiff pleaded in bar, that the said 120*l.* was not due in manner and form, this traverse was informal for want of adding "or any part thereof," for if any rent at all was due, the defendant was entitled to recover it on his avowry; but after verdict this defect was cured. *Cobb v. Bryan*, 3 Bos. & Pul. 348. So where the plaintiff declared he had served the defendant during a certain space of time, and the defendant traversed the service during that precise period, this traverse was too narrow; for defendant ought to have traversed it *distributive*, otherwise the plaintiff on the issue could not recover any thing, without showing a service for the whole time. 1 Saund. 270, and vide 1 Burr. 317.]

If in ejectment the defendant pleads a surrender of a copyhold by the hands of J S, then steward of the manor, and issue is joined, *absque hoc*, that he was steward; this is naught, for the traverse ought to be general, that he did not surrender; for if he were not steward, the surrender is void: so of a surrender pleaded into the hands of the tenant of the manor.

Cro. Eliz. 260, *Wood v. Butts*.

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In battery, the defendant pleads a judgment obtained by A, his father, and an execution thereupon, whereon the goods of J S were taken in execution; and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon in aid of the bailiffs, and by their command, the defendant *molliter manus imposuit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied *de injuriâ sui propriâ, absque hoc*, that the defendant by command of the bailiffs, and in aid of them, to prevent a rescue of the goods, &c.; whereupon the defendant demurred generally: and upon argument it was resolved, 1st, That the replication in traversing the command of the bailiffs was not good, for he might of himself do that to prevent the rescue, which is a tort and breach of the peace. 2dly, The defendant's plea is ill, for the action was brought as for a battery at D, and the defendant justifies at S in the same county, whereas the bailiffs have authority through the whole county, and therefore the cause of justification in the same county not local; so that he should have conformed and justified in the same place, being the same county where the plaintiff declared; and if the place had been material, he ought to have traversed all other places within the same county; *et sic quâcunque viâ datâ*, the plea was held ill.

3 Lev. 113, Bridgwater v. Bythway.

[To an action of trespass in the common called A, the defendant pleaded that A and B commons lie open to each other, and then prescribes for a right in both commons. It was holden, that the plaintiff could not traverse part only of the prescriptive right claimed by the defendant, the prescription in A, but must traverse the *whole* prescription, for all prescriptions are entire; and when they are pleaded, the adverse party cannot deny a part only, but must either demur or traverse the whole.(a)]

Morewood v. Wood, 4 Term R. 157.] [(a) Mr. Serjeant Williams observes, that perhaps this case of Morewood v. Wood may be distinguished from the cases subsequently stated, (see below,) by its being a *prescription*, which is in its nature entire, and therefore cannot be denied *in part*, but the whole must be traversed. See 1 Will. Saund. 269. And the last learned editors of Saunders remark, that the principal argument relied on in Morewood v. Wood was, that the plaintiff, by narrowing the prescription, had deprived the defendant of the means of proving his right by evidence of acts of ownership exercised in the other common B, which evidence he was entitled to adduce, having stated in his plea the connection between A and B. If the plaintiff meant to deny that connection, he should have traversed the averment of it; if not, he should have traversed the whole prescription, and so admitted the connection. This argument assumes, that upon the narrow traverse the defendant would not have been at liberty to adduce evidence of the connection between A and B, and then to establish his right upon A by evidence of the exercise of it upon B; which point seems not to be clear, inasmuch as the whole of such evidence taken together would go directly to prove the issue on the record; and in this view of the case it is directly contrary to Harpur v. Painter. See note (h), 1 Will. Saund. 269, (5th ed.)]

[[The case of Harpur and Painter, East. 18 Geo. 3, K. B., is perhaps hardly reconcilable with this decision. This was an action of trespass, *quare clausum fregit*; the defendant pleaded the *locus in quo* was parcel of a large waste, and that the waste was the soil and freehold of Mr. Bassett, and justified as his servant. The plaintiff replied, that the *locus in quo* was the soil and freehold of Mr. Pitt, and not the soil and freehold of Mr. Bassett. The defendant demurred specially: the cause of demurrer assigned was, that the replication contained no traverse of any thing asserted in the plea, but was merely argumentative. Batt, for the defendant, argued, that it was a settled point that the replication must traverse, or confess and avoid

(H) *Traverse.*

the bar directly. 1 And. 166; 1 Leon. 77, Zouch and Barnfield's case. The plaintiff might have traversed the *locus in quo* was part of the waste, or that the waste was the soil and freehold of Mr. Bassett, &c. He has not done this, but has traversed what was merely argumentative, for there was no allegation in the plea that the *locus in quo* was the soil and freehold of Mr. Bassett, and cited Priddle and Napper's case, 11 Rep. 8 b. Chambre, *contra*, argued, that the plaintiff had tendered the only proper issue. The sole point contended for by the defendant was, that the whole waste belongs to Mr. Bassett, the plaintiff says only part is Mr. Pitt's; if he had tendered the issue that the whole was not the soil and freehold of Mr. Bassett, it would have been immaterial, because, had it been found with him, it was no necessary consequence that any part belonged to Mr. Pitt. It was objected, that the matter put in issue was no assertion: that cannot be stated, without showing the plea bad, because it was equally argumentative. (See 36 H. 6, 19 b, 20 a, *per* Billing accordingly.) See *Definition of an Issue*, Co. Lit. 126. It is enough if the party denies the substance and effect of what is said, without following the words of the other party. 2 Salk. 629, Gilbert v. Parker. In 11 Rep., the only determination was that matter of law could not be traversed: with regard to what is there said of ancient demesne, it may be answered, that it can only be so by being parcel of a manor: he cited the above-mentioned case from Bro. *Traverse*, 156. Batt in reply—The averment is as distinct here as that in Priddle v. Napper, that the *locus in quo* is parcel of a manor which was ancient demesne. The issue, if found for plaintiff, would have been material, because Mr. Bassett claimed it only as parcel of the waste; therefore it would be decisive that the whole was not his. Lord Mansfield—The point in dispute is, whether the *locus in quo* be the soil and freehold of Mr. Bassett. It is nothing to the plaintiff whether the whole waste belongs to Mr. Bassett. Is not the assertion that the whole is his, an assertion that every part is so? The court were unanimous against the demurrer, but on some particular circumstances attending the case, the defendant was allowed to withdraw his demurrer and take issue. But the contrary seems to have been held in Bradburn v. Kennerdale, Carth. 164, where the defendant made cognisance as bailiff to Sir P W, for that Sir P, *tempore quo*, &c., was seised of the manor of A (of which the *locus in quo* is, and time out of mind was, parcel) in his demesne as of fee, and that the defendant as bailiff took, &c., damage feasant. It was held, that the plaintiff could not traverse the seisin in fee of the *locus in quo*, because there was no positive and express allegation that Sir P was seised of the *locus in quo*, but only argumentatively, and by consequence, as it was parcel of the manor.

See 1 Will. Saund. 268 a, (5th ed.)

So also in trespass *quare clausum fregit*, the defendant pleaded that A B was seised in fee of the *locus in quo*, and also of a close adjoining the *locus in quo*, and before the time when, &c., demised the said close to defendant for a certain term of years, together with all ways then appurtenant to the said close, or used or enjoyed therewith, and afterwards demised the *locus in quo* to plaintiff, and then averred that at the time of the demise a way over the *locus in quo* was used and enjoyed along with the demised close, and that the defendant entered, &c., to enjoy this way. The plaintiff in his replication, instead of traversing the demise in the terms of the plea, or of traversing that the way was used or enjoyed with the demised close, replied, that A B did not demise the said close to the defendant together with the said way over

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the *locus in quo*, to which the defendant demurred; and on the case coming on for argument, the court expressed themselves strongly against the replication as being argumentative, and not directly traversing any allegation of the plea; whereupon the plaintiff's counsel declined arguing the point, and had leave to amend.

Nicholson v. Evans, Mich. term, 1825, K. B., MSS.||

[To an action of trespass the defendant justified, under a prescriptive right to a duty, and also a prescriptive right to distrain for it. The plaintiff traversed the prescription for the duty, but not the prescriptive right to distrain; and upon demurrer for that cause, the replication was holden good.

Griffith v. Williams, 1 Wils. 338.

To an action of covenant by an assignee for rent arrear, the defendant pleaded that the lessor made a conveyance in fee before the lease, and traversed that he was afterwards seised in fee. This traverse was adjudged to be bad for its generality, as it tied the plaintiff up to prove an estate in fee, when any other would do.

Palmer v. Ekins, 2 Stra. 817.]

||But it has been decided, that in covenant by the assignee of the lessor against the lessee for rent in arrear, an allegation that the lessor was possessed for the remainder of a term of 22 years, commencing on, &c., is material and traversable.

Carrick v. Blagrave, 1 Bro. & B. 531.||

In replevin the defendant makes conusance as bailiff to J S, plaintiff pleads that he took them *de injuriâ suâ propriâ, absque hoc*, that he was bailiff to J S. To which it was demurred: and after argument the traverse was held to be well taken; and a difference<sup>(a)</sup> observed between an action of trespass *quare clausum fregit*, and an action of trespass for taking cattle or replevin: in the first case, if the defendant justifies an entry into the close by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not in his replication traverse the command; because it would admit the truth of the rest of the plea, viz., that the freehold was in J S and not in the plaintiff; which would be sufficient to bar his action, whether the defendant was empowered by J S to enter or not; for it is not material that the defendant has done a wrong to a stranger, if it be none to the plaintiff: but in the other two cases, if the defendant justifies taking the cattle as bailiff to J S, in whom he lays a title to take them, as for a distress, or other cause, there it may be material to traverse the command or authority; for though J S had right to take the cattle, yet a stranger who had no authority from him will be liable; so that both parts of the defendant's plea in this case must be true, and therefore an answer to any part is sufficient: so in trespass for taking goods; *aliter*, in trespass *quare clausum fregit*.

Salk. 107, pl. 1, Trevilian v. Pyne. (a) For this vide Cro. Eliz. 14; Roll. R. 46; 2 Leon. 215; Yelv. 148; Comb. 471.

||But the rule is now the same in trespass *quare clausum fregit*; for it is settled that where a defendant pleads *liberum tenementum* in another, and an entry by his command, that the plaintiff may traverse either the *liberum tenementum*, or the command.

Chambers v. Donaldson, 11 East, 65.||

In replevin the defendant made conusance as bailiff of J S for a rent-charge; the plaintiff in bar says that he took the distress without the privity or command of J S, and that such a day after the distress J S came first to have

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notice, *et deadvocavit captiones prædictas* : the defendant demurred generally. *Et per cur.*—The bar is naught, for he should have traversed his being bailiff; and he was ruled to replead accordingly, and to mend his bar, paying costs, and go to trial upon issue, bailiff or not.

3 Lev. 20, *Dobson v. Douglas*.

If on a presentment for not repairing a high way, it is alleged that the defendant is chargeable *ratione tenuræ quarundum terrarum parcell. dictæ peciæ terræ, &c., dicta communi alla via regia inclus. et incrochiat.*; the traversing the *ratione tenuræ* is sufficient, without answering to the encroachment, being the principal point to be traversed.

2 Sand. 160, *Rex v. Stoughton*; ¶ and vide the notes to this case in Will. Saund. (5th ed.)¶

A traverse must be taken to some matter alleged; and therefore where in false imprisonment the defendant justified by process out of an inferior court, and the plaintiff replied, that the cause of action accrued out of the jurisdiction, *absque hoc*, that it accrued within the jurisdiction, the traverse was adjudged ill, being of a matter not (a) alleged before; but it was held, that this being only an immaterial traverse, no advantage could be taken of it on a general demurrer, and that then the residue of the replication should stand good.

Lutw. 935, 1560. (a) Mere matter of supposal is not traversable, no more is matter alleged out of due time, nor matter immaterially alleged. 2 Salk. 628, pl. 2; Ld. Raym. 349.—But whatever is necessarily understood, intended, and implied, is traversable, as much as if it were expressed. 2 Salk. 629, pl. 6; ¶ 6 Mod. 158, and see 2 Will. Saund. 9 c.¶

In case against a sheriff for taking insufficient bail to the intent to deceive him of his debt, the (b) intention to deceive is not traversable.

Sid. 96. (b) That matter of intentment is not traversable. Style, 383; Leon. 50, S. P. Nor cause of suspicion. 3 Bulst. 284.

In ejectment, ancient demesne was pleaded in bar; plaintiff replied, that the lands are pleadable at common law, and traversed that the tenements are parcel *de antiquo dominico*: and it was adjudged ill on demurrer; because he should have traversed that the manor was ancient demesne, or that these tenements were held of the manor.

Show. 271.

In an action of (c) covenant a person cannot take a traverse in mitigation of damages, but must help himself upon (d) evidence; and the traverse must be to the (e) point of the action: as in covenant for payment of rent, the plaintiff says that there were seven years' rent behind; the defendant cannot traverse two of these years being behind, but must plead covenants performed. (g)

(c) That where the declaration is special, the defendant shall have liberty to traverse the special matter. Carth. 82. (d) That in many cases the matter may be specially traversed; which probably might have been given in evidence upon the general issue. Carth. 82; ¶ see *antè*, p. 568, 569.¶ (e) In trespass, that which comes under the *ita quod*, for aggravation of damages, need not be traversed. Lev. 283.—(g) How can he plead covenants performed, whether rent is or is not in arrear?—If there is not any rent in arrear, the defendant should plead rent not in arrear.—If rent is in arrear, he should move the court to stay proceedings, on payment of all rent in arrear, and costs: If there is any other breach of covenant assigned, plaintiff may go on for that. ¶ But the plea of no rent in arrear is a bad plea in covenant, 1 Brownl. 19; Cowp. 588; and if the rent has been paid, it may be pleaded as an accord and satisfaction for the damages by reason of the breach.¶

## (H) Traverse.

In debt on a judgment obtained 1 May, 14 Car. 2, before the mayor and bailiffs of Norwich, at a court then held according to the custom of the said city, the defendant pleads, that the court there, according to the custom, &c., is held before the mayor, *absque hoc*, that he recovered at the court held the said 1 May, before the mayor and bailiffs, according to the said custom. And upon demurrer, (a) the traverse was held ill in traversing a matter of record which is not to be tried *per pais*, and in (b) joining the matter of the custom, which is triable *per pais*, with the matter of record; but he ought to have pleaded *nul tiel record*, which would have made an end of all, or that there was not any such custom, and have tried it *per pais*; it was likewise held, that making the day parcel of the issue made the traverse ill.

Lev. 193, Dring v. Respass. (a) That it would have been good after verdict. Hob. 244; Hutt. 20. (b) A traverse must not be multifarious, but to a single point. 3 Lev. 40, 41.—Traverse must not be implicated. Skin. 63, 64.

Debt upon an obligation to the sheriff, conditioned to appear *octabis Martini ad. respondend.*, &c. Defendant pleaded the statute 23 H. 6, c. 9, and that he was taken and imprisoned *virtute brevis retorn. quinden. Martini*, and that the obligation was taken for ease and favour. The plaintiff replied, *auter brief retorn. octabis Martini*, and that he was taken and imprisoned upon that, *absque hoc*, that he was in prison *virtute brevis quinden. retorn. Martini*. The defendant demurred generally. Saunders argued, that the traverse was ill and immaterial; for it matters not whether the writ was returnable *quinden. Martini* or not, but he should have concluded *et hoc paratus est verificare*, and left the defendant to traverse the writ returnable *octabis Martini*; and upon this traverse no good issue can be taken; for it is not material whether any writ was returnable *quinden. Martini*, or not; the only material thing to maintain the goodness of the obligation is this, that the writ was returnable *octabis Martini*. *Sed per curiam*.—If the traverse be immaterial, the defendant waiving that should have traversed the writ's being returnable *octabis Martini*; but the traverse is well enough in this case, it being taken to the most material thing pleaded in bar to avoid the obligation. They therefore gave judgment for the plaintiff.

2 Lev. 174, Gold v. Cutler.

In debt on a bond made by a prisoner to an under-sheriff, conditioned to pay 60*l.*, the defendant pleads the statute 23 H. 6, c. 9, of sheriffs' bonds, and that this bond was made for ease and favour, and so void by the statute. The plaintiff replies, that it was for the better security of money due to himself, and traverseth the case and favour: and herein it was adjudged for the defendant; for though the traverse be good, yet the inducement being ill, in not saying that it was *pro bono et vero debito*, the plaintiff cannot recover.

Comb. 245, Foden v. Haines.

If in an action on the case for stopping three windows, the defendant justifies the stopping of two of them, and traverses the stopping of three windows; the traverse is ill, for the inducement goes only to part, viz., the stopping of two windows; and yet the traverse goes to all three, which ought not to be; for if the defendant had stopped only two, yet in case the plaintiff shall recover damages (c) *pro tanto*; and therefore the defendant ought to have pleaded, as to the stopping of one window, not guilty, and as to the other two to have justified, and then every part of the injury alleged by the plaintiff had been put in issue.

Yelv. 225; Bulet. 116; Saund. 268, S. C. cited, and like point adjudged. (c) That Vol. VII.—73 3 C

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in an action for damages, and in which the plaintiff is to recover in proportion to his loss, every part is to be put in issue. 2 Saund. 206.

In *assault* the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, he *moderate castigavit* the plaintiff, *prout ei bene licuit*. The plaintiff maintains his declaration; *absque hoc, quod moderate castigavit*: after verdict for the plaintiff, it was moved in arrest, that the issue was not well joined; for *non moderate castigavit* doth not necessarily imply that, that he did beat him at all, and so no direct traverse to the defendant's justification, which *imoderate castigavit* would have been; but *de injuriâ sui propriâ absque aliquâ tali causâ* would have been the most formal replication; but it was held to be well enough, being after verdict. (a)

Vent. 70. *Aubrey v. James*; Sid. 444; 2 Keb. 633, S. C. (a) But the general replication would have been better, as it would have obliged the defendant to prove the whole of his plea.

In debt upon a bond entered into to Eliz. Perkins, who was the plaintiff's wife, he, as her administrator, brought the action; the defendant pleads that he delivered the bond to one Eliz. Perkins, *que obiit sola et incompeta, absque hoc*, that he delivered it to Eliz. Perkins, the plaintiff's wife. To which it was demurred specially; for if it be taken that there are two of the name the defendant should have pleaded *non est factum*; (b) for it amounts to no more; or at least he ought to have induced his plea, that there were two Eliz. Perkins's; but this traverse is designed to bring the marriage in question, which is not to be tried; wherefore the court gave judgment for the plaintiff.

Vent. 77. *Gifford v. Perkins*; Sid. 450; 2 Keb. 633, S. C. adjudged. (b) How could *non est factum* be an answer to the bond, when produced in court, though in possession of a person not entitled to recover upon it!—Might not defendant have pleaded generally, admitting the bond to be his, but that it was not given to the E. P. mentioned in the declaration, but to another E. P.? Indeed now, by virtue of the stat. 4 Ann. c. 16, § 4, he might plead *non est factum*, and a special plea. [It would seem, that the defence might be made on the plea of *non est factum*, for that plea would put in issue that the defendant did not execute a bond to the Eliz. Perkins of whom the plaintiff was administrator. Perhaps a plea of *ne unques administrator* might also be expedient.]

In *assumpsit* against an executrix she pleads several judgments, and that she hath not assets *ultra*. The plaintiff replies, that *judicia prædicta, &c.*, were kept on foot by fraud. The defendant maintains her bar, and traverses that all or any of the judgments were kept on foot by fraud. And on demurrer it was objected, that the defendant ought to have rejoined severally to every judgment, and not to include all three judgments in one general traverse: but it was held, that this general form of pleading was good, it being no disadvantage to the plaintiff; for if issue had been joined that all the judgments had been kept on foot by fraud, and if it had been found that one of them alone had been kept, &c., by fraud, this issue had been found for the plaintiff; because the plea was false in part, and for that reason the whole is false. (c)

Carth. 125; *Beake v. Kent*, 4 Mod. 63, S. C. [It is usual to reply and rejoin in such cases severally as to each judgment, and such a replication is not double. 1 Saund. 337.] (c) The traverse should have been that all or any, or *either, &c.* The next paragraph is not in point against this position; [and see 1 W. Saund. 312 d, note (5).]

Lessee for years brings covenant against the lessor, declaring upon a demise and covenant for quiet enjoyment, and assigns for breach, that the lessor did enter upon him, and oust him of the premises; the defendant pleads that he entered to distrain for rent arrear, *absque hoc*, that he ousted him



## (I) Pleas in Bar, their Sufficiency, &amp;c.

*de premissis*; to which the plaintiff demurred, thinking the traverse ill, because if he had ousted him of any part of the premises he had a good cause of action; therefore he should have traversed, *absque hoc*, that he ousted him of the premises, or any part thereof: but *per cur.*—The plea is well enough in this case; for if the plaintiff will join issue upon the matter of the traverse, and prove the ouster of any part, the issue will be for him; and the court took a diversity between pleading the general issue, as in debt you must plead *non debet nec aliquam inde parcellam*, and a special issue, as this is.

2 Salk. 629, pl. 5, *White v. Bodinam*. [Vide 3 Bos. & Pul. 380; 1 Saund. 270; 1 Burr. 317, *et supra*, p. 573.]

¶ Where an action is brought for damages, in which the plaintiff is by law entitled to recover *in proportion* to the loss or injury sustained, it seems to follow that a traverse which ties him up to prove the *whole* damage stated in his declaration, before he can recover it all, is contrary to the principles of law which govern actions of this kind, and therefore cannot be supported. It shall not be permitted to a defendant, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do if the defendant had pleaded only the general issue.

2 W. Saund. 207, note 24.]

¶ Facts stated by way of inducement are not traversable; and the party, by joining issue on the facts traversed, does not admit the truth of the inducement.

*Fowler v. Clark*, 3 Day, 231.

When time and place are immaterial, if they are traversed, it will be bad on special demurrer.

*Rogers v. Burk*, 10 Johns. 400.*g*

## (I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. *That the Plea must be proper, and adapted to the Action.*

HEREIN it is laid down as a general rule, that every man must plead such pleas as are pertinent and proper for him, according to the quality of his case, estate, and interest.

Co. Lit. 285, 303; Hob. 162. β The plea should be direct by stating with sufficient precision the matter of defence; it should not leave it to be found out by inference, however strong. *Savery v. Goe*, 3 Wash. C. C. R. 140.*g*

As, in an action of debt upon a bond or other specialty, the defendant cannot plead *nil debet*: it is otherwise in debt founded upon a matter *in pais* only, as upon a prescription, or upon a deed, that is not requisite to maintain the action.

Hard. 332; of pleading *non est factum*, vide *infra*.

Therefore, if an action of debt be brought on a bond or single bill, and the defendant plead payment without an acquittance under seal, this, though it be found for him, will not entitle him to judgment; for the obligation is in force till it is dissolved *eo ligamine quo ligatur*.(a)

Cro. Ja. 377, *Wingfield v. Bell*. (a) Payment at or after the day may now be pleaded by virtue of the stat. Ann. c. 16, § 12; [but it is not a good plea to a suit by the crown. 1 Price, 23.]

So in debt for the arrears of an (b) annuity granted for life, *nil debet* is no good plea; for the action is merely founded upon the deed, since without it

## 1. Plea in Bar, their Sufficiency, &amp;c.

no action can be maintained: and though by the death of the grantee the nature of the action is changed, the remedy being determined, yet this proves not that the action is founded upon the deed.

Kelw. 147. 1 But it does upon the grant of a rent charge *nil debet* is a good plea, because the plaintiff must either remedy it *in rem* or *in personam* by distress. Otherwise upon the grant of a new immunity, or where being no remedy by distress the grant must be avoided by manner of assize, a nullity *in personam* by acquiescence. Hardr. 33.

Where the action is founded upon a penal statute it hath been adjudged that *not guilty* is a good plea.

Cro. Eliz. 275; Gould. 22. Nott. 56; 2 Inst. 651; Moor. 914, pl. 1293. [Certain it is, that the plea of *not guilty* to debt for a penal statute is not such a nullity as will warrant the plaintiff in signing judgment. 1 Term R. 462:] [and see 3 Bos. & P. 111.]

So in debt upon the 2 & 3 E. 6. c. 13, for not setting forth tithes, it hath been held that *not guilty* or *nil debet* are good pleas.

2 Inst. 651. and H. 6. 215. S. P. assigned.

In debt for the arrears of a rent-charge by will devised to the plaintiff's wife for life, against the administrator of the occupier of the land, it hath been adjudged that *nil debet* is a good plea: for a will is no deed, nor wants any delivery: and in this case it was said that the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing thereout.

Hardr. 332. Wilson's case. 1 Where the testator could not plead *nil debet*, his executor shall not plead *nil debet*. 2 Mod. 356.

In debt for rent, if it be by deed, the proper plea is *non est factum*; but if it be without deed, the defendant may plead *non circumst.* nothing in arrear, or that he never entered: also, by the better opinion of the 5 books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment.

Hardr. 332. (5) For which vide Hedl. 54; Dyer. 14; 4 Leon. 18; Vent. 41; Mod. 3; Sid. 423; Palm. 117; Salk. 309, pl. 1; Ld. Raym. 170. [So in debt for rent reserved by deed, *riens in arrears* is a good plea. Corp. 568.]

[So in debt for an escape, or on a *decestarit*, *nil debet* is a good plea; for the escape and the *decestarit* are the foundations of the action.

Lord Raym. 1502; 1 Will. Saund. 35 a.]

It is said, that *not guilty* is a good plea to any misfeasance whatsoever, (c) though formerly in actions for nonfeasance *not guilty* was not pleaded, but they pleaded specially, and traversed any special point alleged in the declaration; and not guilty to such actions was not pleaded till after the time of the case of Yalding v. Fay. (d)

(c) 3 Mod. 324, *per cur.* Skin. (d) Moor. 355, where the case was, the plaintiff declared on a custom that the parson should find a bull and a bear, to which the defendant, *protestando* that there was no such custom, pleaded *not guilty*; on demurrer it was held, that *not guilty* was no plea to an action for a nonfeasance, being two negatives, which cannot make an issue; but the court held, that to an action for a misfeasance it was otherwise. Cro. Eliz. 569, S. C.; and vide Palm. 393; 2 Roll. R. 368. [But wherever an act of nonfeasance amounts to a tort, so as to be the subject of an action on the case, *not guilty* is a good plea to it;—as in case for not removing a distress within a reasonable time,—for not assigning a bail-bond, &c., &c.]

In *assumpsit*, the defendant pleaded *not guilty*, issue thereon, and verdict that he was guilty, and that he assumed in manner and form as declared; and it was moved in arrest, &c., that *not guilty* was no issue in this case,

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and the finding farther that he assumed is void, not being in issue; but Wyndham and Twisden being only in court, held it cured at least by the verdict, and Wyndham held that not guilty (a) was a good plea, and issue in *assumpsit*, it being a trespass on the case.

Lev. 142, *Elrington v. Doshant*. (a) But in the case of *Marshal v. Gibbs*, in B. R. Mich. 9 G. 2, it was ruled to be ill on demurrer, though good after verdict, according to this case. 2 Stra. 1012, S. C.; ¶and see *Cro. Eliz.* 470; *Atk.* 77; 2 *Salk.* 734.¶

In an action of covenant for non-payment of rent, the defendant cannot plead levied by distress, for that is a confession it was not paid at the day, for it could not be distrained for till after the day. But it was agreed that the covenant alters not the nature of the rent, (b) but that nothing behind, or payment at the day, is a good plea.

2 *Brownl.* 273, *Hare v. Savile*, adjudged. (b) But this in 1 *Brownl.* 91, *per cur.* was held a bad plea, for that by it the defendant confessed the covenant broken, and it tended but in mitigation of damages. ¶And the proper mode is to plead the payment as an accord and satisfaction. *Vide antè.*¶

*Nil debet* was pleaded to an action brought on a covenant for a forfeiture, and on demurrer the plea was held ill.

*Trin.* 5 G. 2, in B. R., *Meard v. Phillips*; 2 *Stra.* 906, S. C.

¶ *Nil debet* is a bad plea to an action founded on a judgment of another state.

*Armstrong v. Carson's Executor*, 2 *Dall.* 302; *Mills v. Durgée*, 7 *Cranch*, 481; 1 *Baldw.* 36.

*Nil debet* in *assumpsit* is no plea, and the plaintiff may sign judgment.

*Condict v. Stephens*, 1 *Monr.* 74.

*Nil debet* cannot be pleaded to an action on a judgment.

*Jacquette v. Hugunon*, 2 *McLean*, 129.

*Nil debet* is the safest issue in debt for a penalty.

*Stilson v. Toby*, 1 *Mass.* 522.

*Non est factum* puts in issue the execution of the deed and nothing more; every material averment before that of execution of the deed is admitted.

*Dale v. Roosevelt*, 9 *Cowen*, 307; *McNeish v. Stewart*, 7 *Cowen*, 474; *Denton et al. v. Bours*, *Anth. N. P.*, 177; *Gardner v. Gardner*, 10 *Johns.* 47; *Legg v. Robinson*, 7 *Wend.* 194.

The plea of *null tiel corporation* is bad on special demurrer.

*Wood v. The Jefferson County Bank*, 9 *Cowen*, 194. But see *Bank of Auburn v. Aikin*, 18 *Johns.* 137.

*Non infregit conventionem* to a breach of covenant of soundness by the seller of property is not good on demurrer, at common law; the party should traverse the unsoundness, but the objection is cured by a verdict.

*Myers v. Bishop*, 1 *Monr.* 111.

*Non assumpsit* and *non assumpsit within five years*, in an action for a tort, are not good, and the plaintiff may have judgment as for want of a plea. 3 *Monr.* 136.g

In trover there is no plea, but a release or not guilty, for every plea in justification, is but tantamount.

*Keb.* 305; *Noy*, 46; *Hob.* 187. [The defendant may plead the statute of Limitations, *Lutw.* 99;] and *vide tit. Trover*.

In *assumpsit* and *quantum meruit* for 20l. the defendant pleaded *onerari non debet*, because he paid the money at the time, &c., *et hoc paratus est verificare*; and it was held by Holt, that *onerari non debet* was no plea here, because the defendant allows the promise to be a good promise, but avoids it by a matter of discharge *ex post facto*, and therefore in this case he should

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have pleaded *actionem non*: but, where the matter of the plea shows that there never was a good cause of action, *onerari non debet* may be proper; as, in debt on a bond, the defendant may plead *onerari non debet quia riens per discent*.

2 Salk. 516, pl. 7; Ld. Raym. 217, *Brown v. Cornish*.

In account, the defendant may plead that he was never receiver, agent, factor, or bailiff to the plaintiff; or, if charged as bailiff, he may plead that he was only hired as his servant to drive his plough, or he may plead a release, or a submission to arbitration.

Roll. Abr. 121, 122; Cro. Car. 116; Hetl. 114.

So he may plead in bar, that after the receipt of the sum of which the account is demanded, by the mediation of their friends it was agreed between them, that the defendant should make an obligation of 100*l.* for the 100*l.* received, and the profit thence to arise; which obligation he did make and deliver accordingly to the plaintiff; for the acceptance of the obligation destroys the duty, and the sum in demand is thereby as strongly released as by a release of all actions.

Roll. Abr. 123; and vide Yelv. 202. [Vide tit. *Extinguishment*, (D.)]

But it is no good plea in bar to an action of account, that the defendant hath made payment of the money which he received, or that he hath made satisfaction, or that the defendant hath given him a receipt or an acquittance for the sum received; for these pleas, being matters that show he was once accountable, are only to be made use of before the auditors.

Dyer, 22, 145; 6 Co. 7, *Ferrer's case*; 4 Leon. 91; Style, 353, 410.

If in account upon receipt by the hands of J S, the defendant plead, never his receiver, &c., and the jury find that he was his receiver of such a sum, &c., and the defendant plead before the auditors that he was possessed of several obligations, in which the son of the plaintiff was bound to the defendant, and that J S paid him this money in satisfaction of those bonds, and that thereupon he delivered to him the said bonds to the use of the plaintiff, which he after accepted, this is no good plea, for it is no more than *not his receiver*, which is found and adjudged against him.

Cro. Eliz. 830, *Trisham v. Ford*, adjudged.

In an assize, the general issue is *nul tort, nul disseisin*; and therefore in an assize of an office it is no plea to say that there is no such office, for that amounts to no more than saying, that he did not disseise him.

Noy, 223; and vide tit. *Assize*.

In an attaint the petit jury can plead no plea but such as may excuse them of the false oath.

Keilw. 130.

In an information in nature of a *quo warranto* against a person, to know by what authority he exercised the office of portreeve of a borough, *non usurpavit* is no plea, which appears from the nature of the charge, which is for him to show by what warrant or authority, &c., to which that plea is no answer. 10 Mod. 211, 299, *The Queen v. Blagden*.

In debt by baron and feme the defendant pleaded (a) *ne unques accouple in loyal matrimony*, and on demurrer it was held an ill plea; because it puts it upon trial by certificate, which admits a marriage, but not *secundum leges ecclesiæ*, and therefore he should have pleaded no marriage in fact, which must have been tried *per pais*.

Show. 50, *Allen et ux. v. Grey*. (a) That this is no plea but in dower or appeal, vide tit. *Bigamy*.

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In waste the general issue is *nul wast*. So, reparation of waste before the writ brought is a good plea in waste, as is a special non-tenure.

2 Inst. 302, 306; Noy, 93; 3 Leon. 203; and vide tit. *Waste*.

In an action of waste for cutting down 300 oaks, the defendant, as to 200, pleaded that the houses let to him were ruinous, &c., and he cut them down, and keeps them to employ about reparation *tempore opportuno*; and on demurrer this plea was held ill.

Cro. Eliz. 593, Gorges v. Stanfield.

Every defendant may plead in a *quare impedit* the general issue, which is *ne disturba pas*; because the plea doth but defend the wrong wherewith he stands charged, and leaves the plaintiff's title, not only uncontroverted, but in effect confessed; and the plaintiff may, upon that plea, presently pray a writ to the bishop, or (at his choice) maintain the disturbance for damages.

Hob. 162; Vaughn. 58, cited.

At common law plenary before the writ of *quare impedit* brought was a good plea: *secus*, of plenary pending the writ: but by the statute West. 2, (13 Edw. 1, st. 1,) c. 5, plenary is no plea in a *quare impedit* or *darrein presentment*, unless it be by the space of six months before the writ brought: also, plenary by six months is no bar against the king, according to the rule *nullum tempus*, &c.

2 Inst. 360, vide tit. *Quare impedit*.

In a *quare impedit*, where the incumbent pleads the presentment of a stranger, there he ought to show that the stranger had a title, and that he was seised of the advowson, &c., or that he was seised of a manor, &c., to which, &c. But where he pleads that he was in for six months by the presentment of the plaintiff himself, or by collation, by lapse, by the ordinary, there he need not make any title.

Noy, 30, Lister v. Cramel. ¶In the former case the title must be supposed to be in the knowledge of the defendant, but in the latter the defendant need not state to the plaintiff his own title.]

¶ A plea in avoidance of a bond illegally taken *colore officii*, should specially state all the facts which show the illegality.

United States v. Sawyer, 1 Gallis. 86.

Every plea in discharge or avoidance of a bond should state positively, and in direct terms, the matter in discharge and avoidance.

United States v. Bradley, 10 Pet. 343.

In debt against the sheriff for an escape, the defendant pleaded that the prisoner inadvertently, and without any intention to escape, went into an office sixteen feet beyond the liberties, and returned in one hour, the plea is bad in not stating the return before suit brought, and thereby avoiding the previous admission of an escape.

Bissell v. Kip, 5 Johns. 89.

When the plea commences as an answer to the whole declaration, but answers only a part, it is bad.

Nevins v. Keeler, 6 Johns. 63; Hallet v. Holmes, 18 Johns. 28; Van Ness v. Hamilton, 19 Johns. 349; Jackson v. McClaskey, 2 Wend. 541; Gillespie v. Thomas, 15 Wend. 464.

When the plea commences in abatement and concludes in bar, it may be considered as a plea in bar, and if a demurrer to such plea conclude in bar, the judgment will be final.

Schoonmaker's Executors v. Elmendorf, 10 Johns. 49.

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A plea of usury, which contains averments, parts of which are to be tried by a jury, and part to be verified by the oath of the party, is bad.

Binney v. Merchant, 6 Mass. 190.

Every plea must contain in itself an answer to the whole declaration, or to a count in the declaration, whichever it professes to answer.

Underwood v. Campbell, 13 Wend. 78.

A plea which answers only a part of the declaration, though it commences only as an answer to such part, is bad on general demurrer; (a) and a plea commencing as an answer only to a part of the cause of action, and praying judgment of the action generally, is bad. (b)

(a) Etheridge v. Osborn, 12 Wend. 399. (b) Loder v. Philips, 13 Wend. 36.

Where a declaration on promissory notes alleged that the defendant did not pay the sums of money in the notes mentioned, &c., and the defendant pleaded *puis darrein continuance*, "that he paid the plaintiff the several sums of money mentioned in the plaintiff's declaration;" on demurrer, the plea was held good, being as broad as the declaration, and the meaning of it being that the defendant had paid the amount of the notes, and, if they were notes carrying interest, that he paid the interest also; and there was no necessity in stating that the plaintiff accepted the money in satisfaction.

Chew v. Woolley, 7 Johns. 399.

Plea of payment of the principal is sufficient, without stating that the defendant had paid the interest and costs.

Tillotson v. Preston, 3 Johns. 229; Chew v. Woolley, 7 Johns. 399.

If an imparlance be given to the defendant, during which he pays the plaintiff's demand, after the imparlance he may plead a regular plea of payment, and is not put to plead *puis darrein continuance*.

Tillotson v. Preston, 3 Johns. 229.

In an action of debt on bond, which had been executed as a collateral security to a mortgage, a plea that the plaintiff had become possessed of the equity of redemption by purchase, was holden bad for want of an averment that the value of the mortgaged premises, when the equity of redemption was conveyed to the plaintiff, was equal to the amount due on the bond.

Spencer v. Executors of Harford, 4 Wend. 381.

When an erroneous judgment has been enforced and the amount thereof collected, and such judgment is subsequently reversed for defect of form merely, and restitution and costs of reversal are awarded to the defendant in the original suit, such defendant cannot plead payment made by him on the erroneous judgment in bar to a second suit on the original cause of action.

Close v. Stewart, 4 Wend. 95.

A plea that on the sale of a chattel the vendor took a mortgage of the same, and, on the mortgage becoming forfeited, took possession of the chattel to dispose of it, and that he might have disposed of it, and out of the avails retained the amount due, is a good defence to a suit for the recovery of the price of the chattel.

Case v. Broughton, 11 Wend. 106.

Upon an agreement to accept notes in payment of goods sold, if, before the delivery of such articles to the purchaser, the notes turn out not to be good, a tender of them will not be considered a payment, unless, by the

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agreement, the seller was to take them as such and run the risk of being paid.

*Rogett v. Merritt*, 2 Cain. R. 117.

The plea must answer the whole matter contained in the count, as in a plea of justification to an action for a libel, each particular charge in the libel must be justified.

*Riggs v. Denniston*, 3 Johns. Ch. R. 198.

When a plea sets up a contract incompatible with that stated in the declaration, held bad as amounting to the general issue.

*Morgan v. Pebrer*, 3 Bing. N. S. 457; 4 Scott, 230.

Debt on bond, plea that after the day of payment, and before action brought, the plaintiff received certain bills of exchange not yet due in satisfaction as to part, and a sum of money as to the residue; held bad on demurrer.

*Worthington v. Wigley*, 3 Bing. N. S. 454; 3 Scott, 555; 5 Dowling, 209, 504.

When the matter pleaded amounts to the general issue, the plea is bad.

*Hill v. Allen*, 5 Dowl. 471; *Ibid.* 209, 504; 3 Bing. N. S. 454; 3 Scott, 555; *Hayelden v. Staff*, 6 Nev. & M. 659; 5 Ad. & Ell. 153; *Taylor v. Hilary*, 1 Cr. Mees. & R. 741. See *Edmonds v. Harris*, 2 Ad. & Ell. 414.

Case for wrongfully discharging plaintiff from the defendant's service, the plea that the plaintiff obstinately refused to work, wherefore he discharged, &c., was held bad, as not showing a disobedience of the reasonable commands of the defendant.

*Jaquet v. Bourra*, 7 Dowl. 348.

In debt, plea of *never did promise*, held a nullity.

*King v. Myers*, 5 Dowl. 687.

In debt, plea *nunquam indebitatus*; held, that defendant could give in evidence that goods were sold to him upon a ready money contract, and paid for within ten minutes after delivery, and that as a debt had never been created, the payment might be given in evidence under this issue, without pleading specially payment.

*Bassey v. Barnett*, 1 Dowl. N. S. 646; 9 Mees. & W. 312.

The declaration against a woman alleged the non-performance of *her* promises, &c., and the plea was "by *his* attorney says that *he* did not," &c.; held not a ground of special demurrer.

*Mahon v. Townsend*, 1 Dowl. N. S. 634.

In debt on simple contract, plea that the goods were sold with the consent of the plaintiff by his agent on account of, and in his own name, and that the defendant had no knowledge of the goods being the plaintiff's, and that such agent was at the time indebted to the defendant, and that he was willing to set off, &c.; replication *de injuriâ*; held, on demurrer, that the plea being matter in excuse, the replication was good.

*Pulcher v. Salter*, 9 Dowl. 517. In England, where the extent of the general issue has been confined, in actions on contracts, and special pleas have become common in *assumpsit*, it has become desirable that the plaintiff, who has but one replication, should put in issue several of the numerous allegations which the special pleas were found to contain; for, unless he would do this, he would labour under the hardship of being frequently compelled to admit the greater part of an entirely false story. It became, therefore, important to ascertain whether *de injuriâ* could not be replied to cases of this description; and, after numerous cases, which were presented for adjudication, it was finally settled that *de injuriâ* may be replied in *assumpsit*, when the plea consists of matters of excuse. 3 C. M. & R. 65; 2 Bing. N. C. 579; 4 Dowl. 647.

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In slander, the declaration stated that the defendant said of the plaintiff he had stolen a *pot and wailer*; plea that the plaintiff stole a *waistcoat pattern*, is not admissible.

Eastland v. Caldwell, 2 Bibb, 22.

In covenant, plea that the plaintiff *agreed to accept* the property at a time, other than that stipulated in the covenant, without showing actual acceptance, is ill.

Collyer v. Hutchings, 2 Bibb, 405.

A plea should not state matter as the cause of action, which occurred subsequent to the commencement of the action; a plea which states such matter is bad on demurrer.

Lockington v. Smith, 1 Pet. C. C. R. 466.

A special plea which sets forth the facts of an agreement may be good on demurrer, although the legal effect of such agreement be not averred.

Okie v. Spencer, 2 Whart. 253.g

2. *That the Plea must be good in Substance; and therein, of Matter of Inducement, and that which is the Gist of the Defence.*

As the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be (a) substantially good, that is, the essence or gist of the plea must be such as, if found for the defendant, the court, according to the rules of law, must dismiss, or give judgment for him. But if the gist of the bar be naught, it cannot be cured even by (b) a verdict found for him. If indeed it be bad only in form, a verdict will cure it; and if the gist be traversed, all collateral circumstances will be intended after a verdict.

(a) Note: That what is substance and what not must be determined in every action according to its nature. (b) A verdict cures not only such defects as may be called artificial defects, and come within the purview of the several statutes of jeofail, but natural defects, or the omissions of the parties in their allegations, which must be presumed to have been given in evidence to the jury, otherwise they could not have found a verdict for the party. Vide tit. *Amendment and Jeofail*, that these statutes do not help substance. 2 Salk. 521, pl. 25. ¶As to the defects which are cured by verdict at common law, and as to those which are cured by the statutes of jeofails, see 1 Will. Saund. 228, note (1).¶

The defendant's plea must fully (c) answer the count or declaration; as where, in assault, battery, and wounding, the defendant pleaded that he was constable of D, and for such a misdemeanor of the plaintiff he laid his hands on him, and carried him to the stocks, *quæ est eadem transgressio*; on demurrer it was adjudged for the plaintiff, because the defendant had not either justified or pleaded not guilty as to the wounding. But if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all.

Cro. Eliz. 268, Pendlebury v. Elmott. (c) That the plea ought to be according to the demand. Hob. 327; 3 Lev. 375.

In replevin the defendant as bailiff to P, who was seised of the third part of the place, &c., justifies for damage-feasant; the plaintiff saith that a stranger was seised of the other two parts, and by his license he put in his cattle; the defendant saith *de injuriâ suâ propriâ absque tali causâ, &c.*; the plaintiff demurs; and it was adjudged no plea, but he ought to answer to the special matter in the bar.

Cro. Eliz. 812, Whitnel v. Cook. ¶This replication was clearly bad, since it put in



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issue an interest in land, which must be done by a special plea. See *Jones v. Kitchin*, 1 Bos. & Pul. 76; and see *Willes*, R. 52; 7 Price, 670.]]

So where in covenant the plaintiff declared that he the plaintiff had covenanted with the defendant to go with a ship to D, in Ireland, and there to take in 280 men from the defendant, and to carry them to Jamaica; and the defendant covenanted to have the 280 men there ready, and to pay for the carriage of them 5*l.* a man, and said that the defendant had not the 280 men ready, but that he had 180, and those he took and carried, and the defendant had not paid for them; the defendant pleaded, that he had the 280 men ready, and tendered them to the plaintiff, and that he would not receive them, but said nothing to the carrying of 180 men, nor to the non-payment for them; as this was not a plea to the whole, but to the carrying only, judgment was given for the plaintiff on a demurrer.

Lev. 16, *Thompson v. Noel*. ]In this case the consideration for the defendant's covenant was divisible, and the plaintiff was entitled to payment for the 180 men actually carried, although he had failed in carrying 280 according to his covenant. Vide 8 Term R. 373; 10 East, 295.]]

If as to part the defendant joins issue, but says nothing to the rest, and this issue is found for the plaintiff, he shall have judgment. But (a) if the matter is pleaded to the whole, though in fact but an answer to part, this is a bad plea, and not helped by the statute.

11 Co. 6 b; 2 Leon. 174; Godb. 55; Roll. R. 161; Cro. Ja. 353; Hob. 187; Goulf. 109; Bulstr. 25; Carter, 51; 3 Lev. 39. (a) Hardr. 331.—If many words contain one thing in signification, if he answers to them in substance it is good. Cro. Eliz. 256.

]]Where the plea professes to answer only part, and is in fact but an answer to part, there the plaintiff may take judgment for the part answered, and if he demur or plead over, the whole action is discontinued.

1 Saund. 38, n. 1, 2, 3; 2 Bos. & Pul. 427; 3 Bos. & Pul. 174; 1 H. Black. 645; 1 Bos. & Pul. 411; 6 Taunt. 646. β A plea, which commences as an answer to the whole declaration, but answers only a part, is bad. 6 Johns. 63; 18 Johns. 28; 19 Johns. 349.g/

But where the plea professes to answer a part, and in fact answers the whole, the plaintiff may demur, for the plea is bad; although it has been said it is a discontinuance, and the plaintiff should take judgment for the part omitted in the introduction.

2 Bos. & Pul. 427; 1 Saund. 28, n. 3.

If the plea profess to answer more than it actually does answer, it is clearly bad, and the plaintiff may demur; as where in covenant for seven quarters' rent, the plea professed to answer the whole, but showed a surrender before the *last four* of the seven quarters became due, the plea was held bad on demurrer because it did not answer the whole breach, which was not entire, and therefore a part of it might be proved. But it is only necessary to answer that part of the declaration which is the gist of the action, and not that which is merely matter of aggravation.

5 Taunt. 27; 3 Wils. 20; 1 H. Black. 555; 2 Camp. 175.]]

In an action of trespass on the case brought by a commoner against a stranger for putting his cattle in the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleads a license from the lord to put his cattle there, but does not aver there is sufficient common left for the commoners, this is no good plea; for though it may be objected the plaintiff may reply thereto, yet, being the very gist of the action, the defendant should have pleaded thereto.

2 Mod. 6, *Smith v. Feverell*; 1 Freem. 190, S. C.



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not repair, and he pleaded generally *'quod reparavit et de hoc ponit se super patriam*, this was held good after a verdict.

2 Mod. 176, Harman's case.

If in a *quantum meruit* for medicines, the defendant pleads that he had paid to the plaintiff *tot et tantas denariorum summas* as the said medicines were worth, without showing what sum in certain he hath paid, this is no good plea.(a)

March, 77. (a) He should have pleaded *non assumpsit*.

If in *assumpsit* the plaintiff declares that the defendant did assume and promise to pay the plaintiff so much money, and also to carry away certain wood before such a day, the defendant, as to the money, cannot plead that he paid it; and as to the carriage of the wood, *non assumpsit*; for the promise being entire cannot be apportioned.

March, 100. [But *non assumpsit* would now be pleaded to the whole, and the payment might be shown in evidence.]

[The defendant cannot plead *non assumpsit*, or *non est factum* to the whole, and a tender as to part; for the former totally denies the cause of action, and the latter partially admits it.

4 Term R. 194; 5 Term R. 97; 4 Taunt. 459.]

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff in 30*l.*, and thereupon, in consideration that the defendant promised to pay the said 30*l.*, the plaintiff promised likewise to release and acquit the defendant of all demands; this is a good plea, for by the account the first contract is merged.

2 Mod. 43; Mod. 205, S. C., *Milward v. Ingram*. [But an account without payment or release is surely no bar in this case. *Mayor, &c. of Scarboro' v. Butler*, 3 Lev. 237.] And an *insimul computasset* with payment amounts to the general issue. Com. Dig. tit. *Pleader*, (2. G. 2.) [Vide tit. *Accord and Satisfaction*.]

If the plaintiff declares upon an *indebitatus assumpsit* for 100*l.*, and upon an *insimul computasset* the same day for another 100*l.*, and the defendant pleads that the said several sums of 100*l.* are for one and the same cause of action, and for one sum of 100*l.* only, and not for several sums; and that after the time of the said several promises made, the defendant, by order of the plaintiff, paid to one B 30*l.* in part of payment and satisfaction of the said money in the declaration mentioned, and in full payment and satisfaction of the residue of the said money did become bound to the plaintiff in a bond of 120*l.* conditioned for the payment of 65*l.* to the plaintiff at a certain day in the condition specified, which 30*l.* and bond the plaintiff accepted, &c., this is a good plea; for though it is no plea to say the several *narr.* are for one sum only, and so to go no further, yet, when the defendant pleads over that the very sum demanded is satisfied, this is a good plea; and if the several 100*l.* were distinct sums, the plaintiff might have replied so, and taken issue thereupon; but when he admits there was but 100*l.* due and that satisfied, the plea is good.

Raym. 449; 2 Jon. 158, *Case v. Barber*.

In trespass for taking several goods, the defendant justified for several amerciaments assessed in a court-baron; but, because he did not show an afferment by the afferors, judgment was given for the plaintiff.

3 Lev. 19, *Coniers v. Frank*. [So *Stephens v. Haughton*, 2 Stra. 847.]

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In trespass for pulling down a gate, treading grass, &c., the defendant, as to pulling down the gate, justified, that time out of mind he had a passage *per et trans* the yard, and that a gate was erected upon the passage so that he could not pass with his beasts, wherefore he broke and pulled down the gate, &c. And on demurrer to this plea, it was objected that the defendant could not justify the pulling down and breaking of the gate, not having shown that it was locked or nailed, so that he could not pass. *Sed per curiam*—Having pleaded that the gate was put there so that he could not use the passage, it shall be intended that it was locked or nailed, or the way thereby straitened that he could not pass, and the plea therefore good.

3 Lev. 92, Sprigg v. Neal.

In debt upon an obligation the defendant pleads that he delivered it as an escrow, *et hoc paratus est verificare*; this held a vicious plea, for he ought to show to whom he delivered it; and also he ought to conclude his plea, *(a) et issint nient son fait*.

Vent. 9. ¶ *Vide anti*, 4 Espin. 255; 4 Maul. & S. 338. ¶ (a) *Vide* 1 Vent. 210.

If in an action for the following words, *Thou art a bankrupt*, the defendant pleads, that such a day and year the plaintiff became a bankrupt, and so justifies, but does not allege that he continued a bankrupt; this is no good justification, for it shall not be presumed that he continued so.

Cro. Ja. 371, Upsheer v. Betts.

If in an action for these words, *She is a thief to you and to me, and hath stolen 20l. from me, and 40l. from you*, the defendant pleads the plaintiff is a thief, and stole two hens from the defendant, this is no good plea; for it does not answer the particular charge in the declaration, and the last words are as material to be answered as the first.

Cro. Ja. 676; 2 Roll. R. 414, Hiden v. Mercer.

If the plaintiff declares, that whereas she was a woman of good fame and reputation, &c., the defendant said of her, *She is a common whore, &c., per quod, &c.*, and the defendant pleads, that at the time when the words were spoken the plaintiff was not of an honest reputation, as in the declaration is alleged, this is no good plea.

Style, 118, Starchy's case adjudged upon a demurrer to the plea.

If the defendant pleads a proper plea, though it is not full it is aided by the statute; and therefore in all cases where issue is taken upon an insufficient plea in bar, which would have been ill upon demurrer, it is held, that after a verdict the defendant shall not take advantage thereof: ¶ That is if the verdict be for the plaintiff, the defendant shall not take advantage of the defectiveness of his plea, but the plaintiff shall have judgment for its falsity; but if the verdict be for the defendant, then the above defect of want of fullness will be cured by the verdict, although it would have been bad on special demurrer; but where the *gist* of the bar is bad, it cannot be cured by a verdict found for the defendant, for that is matter of substance; and it appears on the record that the defendant's defence is no bar to the action; for it is a general rule (which is equally applicable to all pleadings,) that a verdict will aid a title defectively set out, but not a defective title; or, in other words, nothing is to be intended after verdict but what is expressly alleged in pleading, or necessarily to be inferred from the facts alleged.

5 Mod. 226, said *arguendo*; Gilb. H. P. C. 140; 1 Salk. 365; 2 Ld. Raym. 1225; 1 Burr. 301; 2 Burr. 1159; 3 Wils. 275; 4 Term R. 472; 1 Term R. 145; 2 New R.

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225 (a); 4 Taunt. 821; 6 Taunt. 305; 1 Bro. & B. 280; 1 Saund. 228 (1); Tidd's Prac. 924, 925.]

In trespass, where the defendant pleaded a concord in bar, but not with satisfaction, issue being taken upon the concord, the plea was held ill for want of satisfaction being pleaded; yet it was not merely void, because concord was a good plea to such an action, though not so fully pleaded as it might.(a)

Cro. Eliz. 778; Roll. Abr. 225; Moor, 696; 5 Mod. 226, cited. (a) So ruled on error being brought; *sed vide* Com. Dig. *Pleader*, (E), 37.]

So in debt for rent upon a lease for years, entry is a proper plea, but not good without saying he did expel and hold him out; yet if issue be taken upon *non intravit*, and found for the defendant, he shall have judgment.

Hob. 326, Reynolds v. Buckle.

In ejectment, the defendant pleaded that one Ridler was seised in fee, and made a lease to him for five years, by virtue whereof he was possessed, until the lessor of the plaintiff entered and disseised him, and made a lease to the plaintiff; that thereupon he re-entered and ejected him, *prout ei bene licuit*. The plaintiff replied that the lessor was seised in fee, and leased to him, and the defendant ousted him, *absque hoc*, that he did disseise the defendant; upon which issue was joined, and found for the plaintiff; and though this issue was vain, it being impossible that a lessee for years should be disseised, yet the defendant shall not take advantage of such an ill plea; but having confessed a lease made to the plaintiff, and it being found that he did not disseise the defendant, judgment shall be given for the plaintiff: but if there had been a verdict for the defendant he could not have judgment; for then the jury would have found against the law, that a termor was disseised.

Cro. Ja. 678, Johns v. Ridler.

### 3. Of general Pleading to avoid Prolivity; and therein, of affirmative and negative Pleas, and of Departure.]

It seems that formerly great certainty and exactness were required in setting forth all the particulars in a declaration, as likewise in pleading the performance of conditions and covenants; as, in a bond for performance of covenants,(a) it was held necessary to demand over of the condition, and likewise of the covenants, and to plead particularly the performance of each of them. This created great inconveniences in overloading the proceedings with a recital of useless facts; and therefore this rule hath in the modern practice received a relaxation; and it is now settled, that where the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls may be encumbered in the length thereof, the pleading shall be general.

Co. Lit. 303; 8 Co. 133; Plow. 123, 126, 129. (a) Salk. 8, 5; Keilw. 95; 40 E. 3, 30. [For a clear statement of the several rules of pleading, tending to prevent prolixity and delay, see Stephen on Pleading, ch. 2, § 6; and see 1 Will. Saund. 117. Serjeant Stephen, after explaining the degree of certainty and particularity required in the allegations in pleading, ch. 2, § 4, rule 7, deduces, from the cases, various rules, which limit and restrain the degree of certainty required in pleadings, and which consequently tend to prevent prolixity. These rules, which appear sound, are, 1st, It is not necessary, in pleading, to state that which is merely matter of evidence. 2d, It is not necessary to state matter of which the court takes notice *ex officio*. 3d, It is not necessary to state matter which would come more properly from the other side. 4th, It is not necessary to allege circumstances necessarily implied. 5th, It is not necessary to allege what the law will presume. 6th, A general mode of pleading is allowed where great prolixity is thereby avoided. 7th, A general mode of pleading is often

(I) Pleas in Bar, their Sufficiency, &c. (*Avoiding Prolixity.*)

sufficient where the allegation on the other side must reduce the matter to a certainty 8th, No greater particularity is required than the nature of the thing pleaded will conveniently admit. 9th, Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. 10th, Less particularity is necessary in the statement of matter of inducement or aggravation than in the main allegations. 11th, With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute, see ch. 2, § 4. ||

As if in an *assumpsit* the plaintiff declares, that whereas there was a certain discourse between the plaintiff and defendant, concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant, and thereupon the defendant, in consideration the plaintiff would do his endeavour and labour to persuade his nephew to marry the niece of the defendant, did assume and promise to pay the plaintiff, &c. ; and avers, that such a day, and divers other days and times, *omnibus modis quibus poterat conatus fuit et elaboravit suadere* his said nephew to marry the defendant's said niece, &c. ; this is a good declaration, without showing in particular how he did his endeavour ; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c., the record would be too long.

Raym. 400, Aglionby v. Towerson, adjudged. β In an action of covenant, the plea stated that the writing was obtained from the defendant by fraud, covin, and misrepresentation ; held bad on demurrer, because it does not show any facts that constitute the fraud, &c. But as such plea does not contain a defence defective in itself, but a good one defectively stated, after a general replication and verdict upon the issue, the defect will be cured. Barlow v. Wiley, 3 Marsh. 460. γ

So in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessaries as he should want, the defendant assumed and promised to pay, &c. ; and avers, that he had found him necessaries, amounting to such a sum, &c. ; this is a good declaration, without showing in particular what those necessaries were, for that would make the record too prolix.

3 Bulst. 31 ; Roll. R. 173, Crips v. Bainton.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, &c., who pleaded, *infra etatem* ; the plaintiff replied it was for necessaries generally : and upon demurrer to this replication it was objected that the plaintiff had not assigned in certain how or in what manner the medicines were necessary ; but it was adjudged that the replication in this general form was good.

Carth. 110, Huggins v. Wiseman ; and vide tit. *Infancy*, letter (I).

So where trover was brought for a library of books, (a) it was held to be good without expressing what they were ; because to set down the particular books would make the record too prolix : and in this case Plow. (b) was cited, where a man pleaded, that he was knight of the shire *per majorem numerum*, and held to be good.

Vent. 114, Emery's case. (a) *Sed qu. de hoc?* He might have declared of a certain number of books ; but surely nothing can be more uncertain than the term *library* ; as what may be a very proper library for a gentleman in one art or profession may be a very improper one for another, &c. || See 2 Will. Saund. 74 a. || (b) Bulkeley's case, cited also Raym. 9.

So, in an action on the case for setting a house on fire, *per quod* amongst divers other goods, *ornatus pro equis amisit* : after verdict for the plaintiff, it was objected that this was uncertain ; but the objection was disallowed by the court. And in this case Justice Windham said, that if he had men-

(I) Pleas in Bar, their Sufficiency, &c. (*Avoiding Prolixity.*)

tioned only *diversa bona* it had been well enough; as a man cannot be supposed to know the certainty of his goods when his house is burnt; and that, to avoid prolixity, the law will sometimes allow such a declaration.

Mich. 16 Car. 2, in *B. R.*, *Prior v. Dawkes*; *Keb.* 825, *S. C.*; ¶and see *Plowd.* 118, 128, 54, 55. But "*divers goods and chattels*" is too general in a declaration in *trover*. 2 *Ld. Raym.* 1410; 1 *Stra.* 637; and see 2 *Will. Saund.* 74.¶

[So in an action on a bond entered into by the agent of a regiment conditioned to pay to the colonel, commissioned and non-commissioned officers, &c., all such sums as he should receive from the paymaster-general, it is not necessary in assigning a breach to enter into the detail, and state the respective proportions each person was entitled to, and the various deductions out of the whole pay upon various accounts.

*Cornwallis v. Savery*, 2 *Burr.* 772.]

¶So where in debt on bond conditioned for J S's rendering a true account of all moneys which he should receive as plaintiff's agent, the defendant pleaded performance in the words of the condition; it was held sufficient, on special demurrer, to reply that J S received divers sums of money amounting to 2000*l.*, belonging and relating to plaintiff's business, as his agent, and had not rendered a true account to the plaintiff of the said sum of 2000*l.*; and it was not necessary to state from whom, or in what manner defendant received the sums.

*Shum v. Farrington*, 1 *Bos. & Pul.* 640.

So in debt on bond conditioned that B R should account for and pay over to the plaintiff, as treasurer of a charity, such voluntary contributions as he should collect for the use of the charity, the defendant pleaded general performance, and the plaintiff replied that defendant had received divers sums, amounting to so much, from divers persons, for divers voluntary contributions for the use of the charity, which he had not accounted for or paid over, the replication was held sufficient on special demurrer.

*Barton v. Webb*, 8 *Term R.* 456; 8 *East*, 85; 2 *New R.* 177.¶ β An assignment of the breach of a guardian's bond, "that the guardian failed to collect sundry sums of money due said ward, and also in spending and wasting the estate of the said ward," is not too general. *Darland et al. v. The Justices of Mercer*, 4 *Bibb*, 523; *Pendleton v. The Bank of Kentucky*, 1 *Monr.* 176.γ

As to general and particular pleading there are many distinctions, which may be reduced to this rule—that a certainty or generality in pleading is required, according to the nature of the subject-matter pleaded. And this has begotten the distinction between negative and affirmative pleas; (a) as, if a man is bound to perform all the covenants of an indenture, if they are all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them; for this would overload the proceedings with a recital of all the covenants, whereas one only might be in controversy between the parties.

*Co. Lit.* 303; *Leon.* 136; *Keilw.* 95; *Palm.* 70; *Lev.* 303; *Sid.* 215; 2 *Vent.* 156; ¶1 *Saund.* 117, n. (1).¶ (a) Mode, and other circumstances of quality, time, and place, are requisites in affirmative pleas, none of which are necessary in negatives. *Show. Parl. Cases*, 97, and several authorities there cited.

But if some of the covenants are in the negative, (b) the defendant must plead specially; for a negative cannot be performed: therefore, on a special demurrer the defendant's plea would be bad; *aliter* on a general demurrer.

*Co. Lit.* 303; *Moor*, 856; *Cro. Eliz.* 691; *Sid.* 87. ¶See 1 *Will. Saund.* 117.¶ (b) But if the negative covenants are all void and against law, and the affirmative good

(F) Pleas in Bar, their Sufficiency, &c. (*General Pleading.*)

and lawful, he may plead performance generally, and the court shall take notice that the negative covenants are void and against law. Moor, 850; Godb. 212; Hob. 12.

Even in affirmatives, our law allows of general pleading where particulars would be many: as in a bond for performance of covenants upon an apprentice's indenture, for finding him meat, drink, washing, lodging, and other necessities, held, that *invenit* meat, drink, washing, lodging, *et alias res necessarias*, is a good plea, though uncertain what or how much: and the reason is not only because it is in the words of the covenant (for that reason doth not always hold; for many times you must show how, and are forced to vary from the words of the covenant in a breach: as, in the case of quiet enjoyment, the breach must allege how, and by whom, and under what title the man was disturbed,) but there is another reason, because the particulars would be many.

Show. Parl. Ca. 9, *arguendo*.

¶ It is a rule in pleading, that whenever a subject comprehends multiplicity of matters, to avoid prolixity generality of pleading is allowed, as a bond to return *all writs*, &c.; or that the sub-collector of subsidies should give an account in the exchequer of *all sums* which he had received, and the other party shall be put to show a particular breach. But if there be any thing specific in the subject, although consisting of a number of acts, they must all be enumerated, as on a covenant "to enfeof all his lands" the covenantor, in showing performance, must state them all.

1 Term R. 753, *per* Buller, J., Co. Lit. 303 b; Cro. Eliz. 253, 749; 1 Sid. 334; 1 Lutw. 421; Com. Dig. *Pleader*, 2 (V) 13, 2 (W) 33.

So if a person be bound "to pay all the legacies in a will," he must specify them all, and aver payment of each: and the reason is because all these facts lie within the knowledge of the party.

1 Will. Saund. 117.¶

Where some of the covenants are in the disjunctive, there the defendant cannot plead performance generally, because both the alternatives are not to be performed; and by pleading performance generally, he does not show in certain what is performed by him; and, therefore, this is bad on a special demurrer, which shows the want of that certainty: but where the plaintiff does not demur for want of such certainty it shall be intended that the defendant performed one of them, and therefore good.

Co. Lit. 303; Palm. 70; Cro. Eliz. 560; Leon. 311. ¶ See Stephen on Pleading, p. 369.¶

¶ And in debt on bond, the condition of which refers to an agreement, it is not sufficient, on special demurrer, to set out, on oyer, the condition, and state that the agreement contains, amongst others, certain particulars, and then plead performance of all the covenants contained in the agreement; for it does not appear that the agreement does not contain negative, or disjunctive covenants, to which a general performance cannot be pleaded.

Earl of Kerry v. Baxter, 4 East, 340.¶

If the condition of an obligation be to perform the award of J S, and he award the obligor to pay 100*l.*, or to procure a stranger to be bound in 200*l.*, &c., the defendant may plead performance generally; because one part is void, and it will be intended that he pleads performance of that part which he was bound to perform, and not the other part.

Savil, 120, 121.

If in debt upon an obligation, conditioned that if the obligee shall enjoy



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such lands till the full age of J S, and if J S, within one month after his full age, makes an assurance thereof to the obligee, then, &c., the defendant pleads, that J S is not yet of full age; this plea is not good without showing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative.

Cro. Eliz. 870, Waller v. Croot.

Where the covenants are to do a matter of law, as to (a) convey, discharge an obligation, ratify, or to confirm, &c.; there, it must be pleaded specially; because, being a matter of law to be performed, it ought to be exhibited to the court, to see if it be well performed, who are judges of the law, and not a jury, who are judges of the fact only.

Dyer, 229; Hob. 69, 170. (a) If the condition be to convey an estate, in pleading it must be shown by what manner of conveyance it was done. Leon. 72; 2 Leon. 39; 2 Mod. 240; Godb. 36. — So, if the condition be to show a sufficient discharge of an annuity, in pleading performance it must appear what manner of discharge it was, that the court may adjudge whether sufficient or not. 9 Co. 25; Hob. 107; [Cro. Eliz. 916.] — In debt upon an obligation, conditioned to deliver all evidences concerning such lands, the defendant must plead that he hath delivered such and such charters, which are all the charters concerning the land. Keilw. 95. But *per* Cro. Eliz. 869, he may plead, that he hath delivered all, &c., and the contrary in some particulars ought to be shown on the other side; *per curiam*.

¶ A plea alleging in general terms that property was subject to an execution, is bad; it should state the facts which make it so liable, that the court may determine.

Harrison v. Wilson, 2 Marsh. 550.*g*

Where the covenants are matters of record, (b) the performance must be shown specially; because it must appear to be done by the record, and is not to be tried by a jury on the general issue.

Co. Lit. 303 b. (b) As to levy a fine. Cro. Ja. 560; 2 Roll. R. 159.

If in debt upon an obligation conditioned that the plaintiff shall enjoy certain lands discharged, or otherwise saved harmless (c) from all encumbrances, the defendant pleads that the plaintiff had enjoyed the lands discharged and kept indemnified from all encumbrances; this plea is naught; for being in the affirmative it ought to have shown how: but if he had pleaded in the negative, *non fuit damnificatus*, it had been otherwise.

2 Co. 4, Manser's case, and the like point in Winch. 9; Cro. Ja. 363, 364; Leon. 71; March, 121; Keilw. 80. (c) If the condition be to save harmless from all bonds entered into for the obligor, *exoneravit et indem. conservavit* is no plea without showing how. Cro. Eliz. 916, adjudged, but that he need not show from what bonds he saved him harmless; [and where a condition is to acquit plaintiff from any damage by reason of such bond or other particular thing, there *non damnificatus* generally is a good plea. Carth. 375;] and Cro. Eliz. 433, *per* Gaudy, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things, for in the last case it is sufficient to plead generally. [If to debt upon bond conditioned to indemnify the plaintiff, the defendant plead *quod indemnem conservavit*, without saying how; this is well enough, if not shown for cause of demurrer. White v. Cleaver, 2 Stra. 681; *sed* vide Hillier v. Plympton, 1 Stra. 422.] [In all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*, and, if there be any damage, the plaintiff must reply it. Cro. Ja. 363, 634; 2 Rep. 4 a; 1 Lev. 194; 2 Wills. 126; 5 Term R. 309, 310; and the case in Cro. Eliz. 916, (*supra*) is distinguishable; for there the condition was to discharge from all obligations, and, in such case, the plea must show the manner of the discharge; besides, in that case the plea was affirmative that defendant *did save harmless*, and then he must show *how*; and so where the bond was conditioned for payment of a sum of money at a day certain, *non damnificatus* was held a bad plea, though it appeared that the bond was given by way of indemnity. Holmes v. Rhodes, 1 Bos. & Pul. 638.]

(I) Plea in Bar, their Sufficiency, &c. (*Particularity, &c.*)

Where the bar is in the negative it is impossible for the plaintiff to go to an issue, for a negative cannot be proved; and therefore the plaintiff must assign a breach, by replying in the affirmative, on which issue may be properly taken: as if a condition of a bond is that the defendant shall not deliver possession to any person but the lessor, or to such persons as shall lawfully evict them, the defendant pleads he did not deliver the possession to any but such as lawfully evicted him; here it comes on the plaintiff's side to assign a breach, and show that he delivered the possession to some person that had not lawfully evicted him; because, the condition being in the negative, the defendant's plea must necessarily be in the negative also, and the plaintiff, to assign a breach, must assign a fact directly opposite to such negative condition.

Lev. 83, Pullen v. Nicholas.

So if an obligation be to perform an award, and the defendant plead no award made, it is not sufficient for the plaintiff to show an award made in his replication, unless he shows also a breach; because the defendant's plea is in the negative, and the plaintiff, by replying in the affirmative, does not show the obligation to be broken; for the showing such an award leaves it uncertain whether it was performed or not; and his having shown that there was an award subsisting, does not make it appear that he was entitled to the money, unless he also shows that the award was broken.

Vide title *Arbitrament*. ¶But Saunders thought this replication good, and, according to his opinion, the case was denied to be law in *Meredith v. Allen*, Carth. 116, where the court said it was not law, and not taken to be so at the bar, at the time judgment was given. And Serjeant Williams observes, that the true distinction between those cases where it is necessary to assign a breach in the replication, and where not, seems to be taken by Holt, C. J., in *Meredith v. Allen*, 1 Salk. 138. "That in all cases (that of a bond for performance of an award excepted) if the defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance supposes it, and the plaintiff need not show that which the defendant has supposed and admitted; but if defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must show a breach, for then he has not a cause of action, unless he shows one." See 1 Will. Saund. 103 c, note (4).¶

The condition of a bond was, that the obligor should render an account of the goods of William Narril, deceased, which came to his hands, and make an equal dividend between him and the obligee; the defendant pleads, no goods came to his hands; the plaintiff must reply what goods came to his hands, and farther assign the breach that he did not account for them: because the plaintiff, by replying the goods came to the defendant's hands, leaves it on his own showing indifferent to the court whether he be entitled to the penalty of the obligation or not, unless he goes farther and shows that the defendant did neither account nor divide them.(a)

1 Saund. 102, Hayman v. Gerrard. ¶(a) The case of an award is an exception to the rule that if a plea contain matter of excuse, which *admits non-performance* of the condition of the bond, the plaintiff need not assign a breach in his replication; and the reason given for the difference is, that an award may be good in part and void in part, and therefore it is incumbent on the plaintiff to show a breach thereof, that the court may judge whether he has well conceived his action or not—for perhaps he has brought his action for breach of that part of the award which is void, and consequently has not any cause of action. *Per Jones arguendo*, 1 Saund. 102; and this reasoning is recognised in 1 Salk. 138, and Willes R. 12.¶

¶Where the bond was conditioned to render an account of all moneys received, and to pay them over, the plaintiff, to a plea of general performance, replied that the defendant refused to render an account of all moneys received,

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without averring that any moneys had been received; such replication was holden bad on special demurrer.

*Serra v. Fyffe*, 1 March, 441, which seems to overrule 1 Price, 109. § Accord of itself is not a good plea, it must aver both accord and satisfaction. *Maze v. Miller*, 1 Wash. C. C. R. 328. §

§ When the condition of a bond on which suit is brought is merely to indemnify and save harmless, *non damnificatus* may be a proper plea, but it is not so when the condition is to discharge or acquit the plaintiff from liability, as from a bond or other thing done, or given by him, creating a liability.

*Neville v. Williams*, 7 Watts, 431. §

If in debt upon an obligation, (a) conditioned to pay 30*l.* to A B and C *tam cito* as they shall come to the age of twenty-one years, the defendant pleads that he paid those sums *tam cito* as they came of age, this is no good plea; for the time, place, and manner of performance, ought to be shown in certain, so that a certain issue might be taken upon it. Adjudged upon a special demurrer.

*Cro. Ja.* 359; 2 Buls. 267, S. C., *Halsey v. Carpenter*. (a) If the condition be to surrender a copyhold, the defendant must not plead generally that he hath surrendered it, but must show when the court was held. *Winch.* 11, adjudged.—If the condition be, that the obligee shall enjoy an office according to letters patent, the defendant must not plead *in hæc verba*, but show the effect of the letters patent, and the enjoyment accordingly. *Hob.* 295.

If in debt upon an obligation conditioned to perform covenants, one of which was for the payment of money upon the making an assurance, the defendant pleads that he paid the money such a day, but saith not when the assurance was made, this is naught; for it ought to appear that the money was immediately paid pursuant to the covenant.

2 Mod. 33, *Duck v. Vincent*.

In debt upon an obligation, conditioned that the defendant at all times, upon request, should deliver to the plaintiff all the fat and tallow of the beasts which should be killed or dressed by the defendant, his servants or assigns, before such a day; the defendant may plead, that upon every request to him made he did deliver to the plaintiff all the fat and tallow of all beasts, &c., without showing how many beasts were killed or dressed, or what quantity of fat he delivered: for if the pleadings were not so contrived as to pursue the covenants, the defendant would be obliged to fill the pleadings with multitudes of useless deliveries, which might not be controverted by the plaintiff; whereas the plaintiff, by assigning a particular breach in the non-delivery at any one time, may bring the whole matter in question.

*Cro. Eliz.* 749, *Mints v. Bethel*.

But here we must take notice of another distinction, viz., that when the condition consists of matters to be done that lie within his own knowledge, though they consist of great variety, yet the defendant cannot plead generally, but must show the particular performance of all matters in his plea; as if the condition be that the defendant, bailiff of the plaintiff's manor, should render an account of all the rents of the manor he has received before such a day; if the defendant plead he has accounted for all the sums before such a day, it is ill; but he must show the particular sums, because it lies within his own knowledge only. (b)

*Cro. Eliz.* 749, cited between *Sands* and *Maleverer*. (b) *Sed qu.* If he may not say he received divers sums, to the amount of such a sum in gross, and that he rendered an account thereof? ¶ In these cases of bonds conditioned for the accounting and paying over of all moneys by agents and receivers, performance is now always pleaded in the words of the condition, and the plaintiff assigns a specific breach. 1 Bos. & Pul. 640; 2 New R. 176; 3 East, 485; 6 East, 507. ¶

(1) Pleas in Bar, their Sufficiency, &c. (*Particularity, &c.*)

So if the condition be that the defendant shall deliver briefs to all churches within such a time, and shall collect the money given upon them and shall deliver it over to the plaintiff; there, the defendant cannot plead generally that he has delivered the briefs, collected the money, and delivered it over to the plaintiff; but he must particularly show what briefs were delivered, what sums were collected, and that he delivered them over to the plaintiff, because such particular facts lie within his own knowledge only.(a)

Sid. 215, Woodcock's case. (a) *Qu.* See note preceding. A much shorter issue might be taken. Suppose he pleaded he delivered briefs to all churches, collected all the money, amounting in the whole to so much, and no more, and that he delivered the same to the plaintiff. If not true in either of the particulars it might easily be falsified by the plaintiff: he might say he did not deliver briefs to all churches, for that he omitted such a church; or that he did not collect the money, but omitted to collect such a sum; or that he collected more than alleged, to wit, so much, and did not deliver the whole to the plaintiff; or that he did not deliver the money collected to the plaintiff, or any part; or not all, only so much.

||And so on the other hand less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

3 Term R. 766; 4 Term R. 77; Hard. 459; 1 Salk. 355; Com. Dig. *Pleader*, (C), 26; 9 Rep. 60 b; 8 East, 80.

This rule is exemplified in the case of alleging title in an adversary; a more general statement is allowed in such case than when title is set up in the party himself.(b)

(b) Vide Stephen on Plead. 373.

So in an action of covenant, the plaintiff declared that the defendant, by indenture, demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same, according to the form and effect of the said indenture; and then the plaintiff assigned a breach,—that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff, it was assigned for error, that he had not in his declaration shown what person had right, title, estate, or interest in the land demised, by which it might appear to the court that the defendant had not full power and lawful authority to demise. But, upon conference and debate amongst the justices, it was resolved that the assignment of the breach of covenant was good; for he has followed the words of the covenant negatively; and it lies more properly in the knowledge of the lessor, what estate he himself has in the land which he demises, than the lessee, who is a stranger to it.(c)

(c) 9 Rep. 60 b.

So where the defendant had covenanted that he would not carry on the business of a rope-maker, or make cordage for any person, except under contracts for government. And the plaintiff in an action of covenant, assigned for breach, that after the making of the indenture, the defendant carried on the business of a rope-maker, and made cordage for divers and very many persons, other than by virtue of any contract for government, &c.; the defendant demurred specially on the ground that the plaintiff had not disclosed any and what particular person or persons, for whom the defendant made cordage, nor any and what particular quantities, or kinds, of cordage the defendant did so make for them, nor in what manner, nor by what acts, he carried on the said business of a rope-maker, as is alleged in the said breach of covenant. But the court held,—That as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be

(I) Pleas in Bar, their Sufficiency, &c. (*Particularity, &c.*)

presumed conusant of his own dealings, than of the plaintiff, there was no occasion to state them with more particularity, and gave judgment accordingly. (a)

(a) 8 East, 80.]

If the condition be that the defendant pay the plaintiff all manner of costs and charges that J S shall charge the plaintiff with, for carrying on a suit; the defendant plead he did pay all manner of costs and charges; this is ill, because it relates to one single point, which may and ought to be shown in certain, in order that the plaintiff may take issue upon it.

Lutw. 419.

[If the condition of a bond be, that A shall not embezzle any money that shall be intrusted to him, or that *in any way* shall come to his hands on account of his master, it is necessary to state in the breach, that a particular sum of money was embezzled, and how, or from whom it was received.

Jones v. Williams, Dougl. 213.]

||But where in debt or bond conditioned for J S rendering and paying to plaintiff a true and just account, payment, and delivery of all moneys, bills, &c., which he should receive as his agent, the defendant pleaded performance in the words of the condition: replication that J S received divers sums of money amounting to 2000*l.* belonging and relating to the plaintiff's business, as his agent, and had not rendered to the plaintiff a true and just account, payment, and delivery of the said sum of 2000*l.*, or any part thereof. The defendant demurred specially to this replication, and showed for cause that the plaintiff had not stated therein, from whom or in what manner, or in what proportion, the said sums amounting to 2000*l.* were received by J S; and in support of the demurrer the case of Jones v. Williams, Dougl. 214, was cited; but the replication was adjudged sufficient, and warranted by the rules of law and precedents. And the court seemed to overrule Jones v. Williams.

Shum v. Farrington, 1 Bos. & Pul. 640; and see Barton v. Webb, 8 Term R. 459.]

A bond to pay from time to time a moiety of all such moneys as from time to time he should receive; payment of a moiety generally, without showing the particulars in certain, was held a good plea, because it is of what he should receive from time to time; otherwise if these words had been omitted, because in that case there would be a stuffing of the rolls with the multitude of particulars.

Sid. 334, Church v. Brunswick.

In an action on the case against the defendant, who promised, that in consideration the plaintiff would discharge a third person then under arrest, that he would pay the money; it was alleged *in facto* that he *exoneravit*, &c.; this was held sufficient without showing how; for that may be done by composition, &c., and without deed.

Cro. Eliz. 913, King v. Hobs.

So in debt upon a bond conditioned to perform the award of J S, if it is awarded that a suit in Chancery by the defendant against the plaintiff shall cease, and the plaintiff stand acquitted *de quolibet materia in eadem contenta*, the defendant may plead *quod stetit inde quietatus*, without showing how, or that he *in facto* discharged him; for it was not intended that an actual discharge should be given, but that by the arbitrament he should be acquitted.

Cro. Ja. 339; Roll. R. 8; 2 Bulst. 93, Freeman v. Sheen.

(I) Pleas in Bar, their Sufficiency, &c. (*Generality.*)

In debt upon a bond, the condition whereof was to free and keep harmless the plaintiff of and from all costs and damages that may arise by reason of a lawsuit, &c., the defendant pleaded *non damnificatus* generally; and on demurrer to this plea it was held good,<sup>(a)</sup> because the condition was to save the plaintiff harmless from something that was uncertain at the time of making thereof, viz., from the costs and charges of the suit, that no costs might be recovered against him; but if it had been to save harmless from a particular thing,<sup>(b)</sup> there such a negative plea generally would not have done, because the defendant ought to show how he had indemnified the other.

Mod. 243, *Harris v. Pett*. ||Vide 1 Saund. 117, n.; 1 Bos. & Pul. 638. || (*a*) The particulars of the damnification should have been shown by the plaintiff in his replication. (*b*) Vide *infra*.

In debt on a bond conditioned to acquit, discharge, and save harmless a parish from a bastard child, the defendant pleaded *non damnificatus* generally; and on demurrer it was held, that being in the negative, he need not show how; and it not appearing on the whole record that the parish was damnified, judgment was given for the defendant.

3 Mod. 252, *Mather v. Mills*.

||But *non damnificatus* cannot be pleaded to debt on bond conditioned for payment of a sum of money at a certain day, although it appears by the condition that the bond was given by way of indemnity.

Holmes v. Rhodes, 1 Bos. & Pul. 638; and see 1 Bos. & Pul. 640, n. (*a*). || *A* The plea of *non damnificatus* is not proper when the condition of the bond is to discharge the plaintiff from liability, as from a bond or other thing done or given by him creating a liability. *Neville v. Williams*, 7 Watts, 421.*g*

In case upon an agreement, in which the defendant promised to assign all the profits which accrued by a voyage made by a ship, &c., the breach assigned was, that the defendant *non performavit agreementum prædict.*: upon a verdict and judgment in C. B. for the plaintiff, error was brought in B. R., where it was insisted that the breach was too general and uncertain; but *per cur.*—Had this been even on demurrer, it would have been good, but being after a verdict it is beyond question, for the plaintiff would not have damages given if he had not proved a good breach; and here the agreement is single, *ss.* to assign; so the non-performance is in the non-assignment, and it being negative, and in the words of the agreement, the judgment was affirmed.

Skin. 334, pl. 13, *Knight v. Keech*.

[In debt upon bond conditioned to perform articles, it appeared by the plea that the articles were an agreement that the plaintiff should furnish the defendant with ale and beer to be sold in his house at such prices, and that he should take it of nobody else, but might be at liberty to take any other liquors (malt liquors only excepted); and what should not be paid for at breaking up the trade, and were undrawn, should be taken back. The defendant pleaded performance. The plaintiff replied, that by the same articles it was further agreed, that what should be drawn should be paid for, and that there was such a quantity of liquors unpaid for. On demurrer by the defendant, it was said, that by the breach it does not appear the liquors unpaid for were malt liquors; and as other sorts are mentioned, the plaintiff should have been more particular; especially in the case of a bond, where he is to subject the defendant to a penalty. And of that opinion was the court, who cited the case of the *African Company v. Mason*. That was a

(I) Pleas in Bar, their Sufficiency, &c. (*Surplusage, &c.*)

bond, conditioned, reciting that the defendant was their receiver at Bristol, if therefore he do well and truly account for all sums by him received, then the bond to be void; the breach was, that he received so much money, and did not account for it; and because it appeared by the recital in the condition to be only about transactions of a particular nature, the general assignment of the breach was holden ill. So is 2 Saund. 411.

*Sübs v. Clough*, 1 Str. 227; 10 Mod. 227; Gilb. R. 238, S. C.]

¶ One of the principal rules to prevent prolixity in pleading, is that there must be no departure. A departure takes place where, in any pleading, the party desert the ground that he took in his last antecedent pleading.

Co. Lit. 304 a; 2 Saund. 84, n. (1); Steph. Pl. c. 2, s. 6, rule 1, p. 405; Gould on Pl. c. 8, s. 65; Pain v. Fox, 16 Mass. 130; Keay v. Goodwin, 16 Mass. 1; Darling v. Chapman, 14 Mass. 101.

After a plea of general performance of the condition of a bond, a replication alleging merely matter of excuse for the non-performance, is bad for departure.

*Larned v. Bruce*, 6 Mass. 57.

In debt on a bond, a plea alleged the rescission of the bond; a rejoinder admitting the rescission, but setting up a parol agreement to the same effect as the bond, is bad for departure and repugnancy.

*Sibley v. Brown*, 4 Pick. 137.

A replication of a new promise to a plea of the statute of limitations is not a departure.

*Little v. Blunt*, 9 Pick. 488.

To a plea of general performance of the condition of an administrator's bond, the plaintiff replies that the administrator did not account for certain property inventoried at \$2000; and the defendants rejoin that they did account therefor, charging themselves with \$878, the proceeds thereof. A sur-rejoinder alleging that it was through their default that it did not bring more, was held bad for departure.

*Dawes v. Winship*, 16 Mass. 291.g

#### 4. Of Surplusage and Repugnancy in Pleading.

If either party, plaintiff or defendant, allege more than is necessary to introduce new matter repugnant and contradictory to what went before, in any point not material, this will not vitiate the pleadings, according to the maxim *utile per inutile non vitiatur*; and such redundant or repugnant part shall be rejected, especially after a verdict: so though there be a repugnancy in any material point, and this be not aided after verdict, yet if it appear that the verdict was given on a different part of the declaration, or if the plaintiff release such repugnant part, judgment shall be given for him.

Co. Lit. 303; Plow. 232, 502; Co. 43; 19 H. 6, 30, 32; Sand. 282; {9 East, 424; } || 1 East, 219; 4 East, 400; 5 East, 443; Dougl. 667.¶ *β* After verdict surplusage in pleading does not vitiate. *Carrol v. Peake*, 1 Pet. 23.g

¶ Where matter is nonsense by being repugnant to something precedent which is sense, there the sensible precedent matter shall not be defeated by the repugnancy which follows, but the subsequent repugnant matter shall be rejected; as in ejectment, where the declaration is of a demise on the 2d of January, and that the defendant *posted, scilicet* on the 1st of January, ejected plaintiff, here the *scilicet* may be rejected, being repugnant to the *posted* and the precedent matter.

1 Salk. 324, 325. *β* In general surplusage will not vitiate a pleading. *Russell v. Rogers*, 15 Wend. 464; *Bruce v. Mathers*, 2 Bibb, 297.g

(I) Pleas in Bar, their Sufficiency, &c. (*Surplusage, &c.*)

But where a material allegation is sensible and consistent in the place where it stands, and is not repugnant to any *antecedent* matter, it cannot be rejected merely on account of there occurring *afterwards* another allegation inconsistent with it, and which latter allegation cannot itself be rejected; as where in an information on the 33 G. 3, c. 52, § 62, prohibiting the receiving of presents by British subjects *holding office* under his majesty or the East India Company *in the East Indies*; the information charged that the defendants being British subjects, on the first day of January, 1794, and for a long time thence, next ensuing, to wit, *until* the 29th of November, 1795, held certain offices in the East Indies, and *during all that time* resided in the East Indies; it was moved, in arrest of judgment, that the word "*until*" must be considered *exclusive* of the 29th of November, 1795, and consequently that there was no sufficient averment of the defendant's residing and holding office in the East Indies *at the time* when the offence was charged; to which it was answered by the counsel for the crown, that the words "*until the 29th of November, 1795,*" being laid under a viz., might be rejected as surplusage which would get rid of the inconsistency: but the court held, that the words being sensible precedent matter, could not be rejected in favour of the subsequent repugnant matter. However, they held the averment sufficient, on the ground that the word "*until*" might *include* the 29th November, 1795.

Rex v. Stevens and Agnew, 5 East, 244.]

In debt on an obligation the defendant pleads payment of 50*l.*, 14 Jun. 11 Jac., according to the condition; the plaintiff replies *quod non solvit* 50*l.* *predict.* 14 August, Ann. 11, *suprad.* *quas ad eundem hiem solvisse debuisset; et hoc, &c.*, the verdict found *quod non solvit predict.* 14 Junii *prout* the defendant had alleged: the objection here was, that no issue was joined, because they do not meet in the time the money was paid; but the word *August* being plainly surplusage, (for when he said *quod non solvit predict.* 14 die, it is a sufficient traverse without the word *August*, and *August* is plainly repugnant to the word *predict.*, for *predict.* refers to *June*.) such surplusage, being a repugnancy to what was before material, was idle and void.

Cro. Ja. 549.

In trespass the bill was filed Hil. 18 Jac., setting forth that the defendant, 2 January 17 Jac., beat the plaintiff's servant, *per quod* the plaintiff *servitium per magnum tempus, ss. a predict.* 20 Martii *suprad.* *usque primum diem Martii extunc prox. sequent. perdidit*; on a *nihil dicit* a writ of inquiry was awarded, and 10*l.* damages; but the defendant had judgment, because the gist of the action is for the use of the plaintiff's service, and the battery is but inducement, and the loss of the service is not *ex necessitate rei* relative to the battery; for the servant might fall ill some time after the battery, and the plaintiff having laid a different month from the battery, there is nothing in the record to determine the court to the 20th of January, and to rectify the month of March as repugnant; and if the loss or the service stands on the month of March 17 Jac. until March following, it takes three months of the time elapsed after the time of the action brought for which the jury was not authorized to give damages.

Cro. Ja. 618, Hanbury v. Ireland.

But in debt upon a bond, conditioned, that if the plaintiff did not depart out of the defendant's service without his leave, &c., then if he paid the plaintiff 100*l.* within 28 days upon demand, the bond should be void; the



(1) Pleas in Bar, their Sufficiency, &c. (*Surplusage, &c.*)

defendant pleaded that the plaintiff, 4 *Maii* 30 Eliz., departed out of his service, and without his leave; the plaintiff replied that 6 Septemb. in the same year she departed with leave, and that afterwards, 4 Octob., she demanded the 100*l.*, which the defendant refused to pay, *absque hoc*, that she departed without leave; it happened that the demand was laid to be 4 Octob., and the writ was tested 18 Octob., so that there were not 28 days between the demand and the action brought, yet the plaintiff had judgment; though upon her own showing she brought the action 14 days too soon; for the issue was upon the departure, and the demand in the replication was altogether immaterial, and therefore was rejected as surplusage.

2 Leon., *Mornings v. Warley*.

If in ejectment the plaintiff declares on a lease made to him the third of May, and that the defendant *posted*, ss. 1 *Maii*, ejected him, this is good after verdict; for by the *posted* it appears that the defendant committed a tort on the plaintiff's title, and when he lays a repugnant day, it is as if he had laid none; and if no day be laid, it shall be intended after verdict that the tort was committed before the action; for it would be very foreign after verdict, to intend that the action was brought by the spirit of prophecy for a wrong to be committed afterwards; and besides, the jury could not take cognisance of any fact done since the action brought, for that was not in issue.

*Yelv.* 94; *Carth.* 288, 289; and vide *Lev.* 194, 195, like point; and vide title *Ejectment*.

In trespass for entering his close 10 *Julii* 44 Eliz., *contra pacem dominæ reginæ Eliz., et domini regis nunc*, after verdict this was moved in arrest of judgment, and held that these words *domini regis nunc* were but surplusage.

*Cro. Ja.* 377, *Coddington v. Wilkin*; *Carth.* 95, S. P.; and vide *Show.* 28, where it is held that this would not be good on demurrer.

If an action be brought, and the plaintiff conclude his declaration with a *contra formam statuti*, and there happen to be no act of parliament in the case, the words *contra formam statuti* shall be rejected as surplusage.

*Vent.* 103, *Ward v. Rich.*

So in trespass for entering his close and treading down his grass and corn, and hunting there, the defendant being an inferior tradesman, *contra pacem domini regis, et contra formam statuti inde provis.*; in this case, though several trespasses are alleged, the last of which only is within the statute, and the conclusion of the count is *contra formam statuti*, which in a grammatical construction goes to the whole count; yet, as in law it goes only to the hunting, it therefore may be applied to the latter part, and rejected as to the rest for surplusage.

*Salk.* 212, pl. 2; *Ld. Raym.* 149; 12 *Mod.* 122; *Com.* 26, pl. 18; *Holt*, 661, pl. 1; *Carth.* 332; 5 *Mod.* 307; *Comb.* 429, S. C., *Bennet v. Talbot*.

¶ If an attorney of B. R., in pleading privilege, state the custom incorrectly, the improper statement may be rejected as surplusage, provided sufficient appears to support the plea.

*Stokes v. Mason*, 9 *East*, 424; *sed vide* *Ld. Raym.* 899.

If a replication to a plea in abatement of the writ, begin, "that the said declaration ought not to be quashed," but conclude properly, it is well enough; for such words may be rejected as surplusage.

*Sabine v. Johnstone*, 1 *Bos. & Pul.* 60.

It is sufficient to state in the condition of a bail-bond, the names of the

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parties, and the time and place of defendant's appearance. If the cause of action be added, it may be rejected as surplusage.

Owen v. Nail, 6 Term R. 702.

In covenant on an indenture of lease, the plaintiff well assigned a breach, that defendant had not yielded the monthly rent, &c. &c., and then alleged, that before the exhibiting of the bill, to wit, on the 1st November, 1797, 900*l.* of the rent received, &c., was in arrear. This date being before the commencement of the lease, and therefore impossible, was rejected as surplusage, the breach being sufficient without it.

Buckley v. Kenyon, 16 East, 139; and see 2 New R. 233.

In a declaration on a promissory note, the words, "the defendant's proper hand being thereunto subscribed," may be rejected as surplusage, and need not be proved.

Booth v. Grove, Moo. & Malk. 182.||

[In an information upon a statute, if the prosecutor is not obliged to negative the exceptions in the statute, and yet negatives some of them, that part of the information shall be rejected as surplusage.

The King v. Hall, 1 Term R. 320; ] ||7 Term R. 27.||

||If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction, (being before the offence committed,) the latter may be rejected as surplusage.

Rex v. Picton, 2 East, 195.||

In *assumpsit* for money had and received by the defendant for the plaintiff, *ad usum* of the defendant; and verdict upon *non assumpsit* for the plaintiff; on motion in arrest of judgment the court held, that these words *ad usum* of the defendant should be rejected, being insensible and repugnant; and then the promise is for money had and received by the defendant for the plaintiff, which is well.

Salk. 24, pl. 7; Ld. Raym. 669; Comyns, 115, pl. 79; 12 Mod. 510; Palmer v. Stavely; Mod. 42; Sid. 3 b, 615.

[In an action of assault against A and B, if A confesses, and B pleads that he and A is not guilty, and issue is joined, and B is found guilty, the words referring to A may be rejected.

Hill v. Fleming, Ca. temp. Hardw. 341.]

In covenant against an apprentice the plaintiff assigned for breach, that the apprentice, before the time of his apprenticeship expired, and *durante tempore quo servavit*, departed from his master's service; the defendant demurred and had judgment; because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*.

Salk. 213, pl. 4, Nevil v. Soper.

So in trespass for taking and carrying away his timber and bricks *super terram jacent. erga confectionem domus de novo ædificat.*; the court held this insensible; for they could not be materials towards building a house already built.

Salk. 314, Lawley v. Arnold.

Trespass *quare clausum fregit et solum fodit.*; the defendant justifies, that his ancestors, and all those whose estate he had in a cottage, have a common of turbary to dig and sell *ad libitum*, as belonging to &c., and adjudged an ill plea, being repugnant in itself; for a

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common appertaining to a house ought to be spent in the house, and not sold abroad ; also, such a common as is above said is an interest and a frank-tenement.

Noy, 145, *Valentine v. Penny.*

If an annuity, common of pasture, common of estovers, or the like, be granted for life of years, &c., the reversion may be granted without attornment ; and therefore to plead it is surplusage, and more than needs ; because in none of them is there any tenure, attendance, remainder, or payment out of land.

Co. Lit. 312 a.

In an avowry for a rent-charge, the defendant made title to Jan. Stiles, with whom he married *anno* 1603, and because at Mich., 1597, 20*l.* was arrear, and not paid to him and his wife, avowed Hil. 7 Jac. ; adjudged a good avowry ; for the saying it was arrear to him and his wife was but surplusage, when the contrary appears, he not being married then.

Cro. Ja. 282, *Bowles v. Poor* ; Bulst. 135, S. C. ; and vide Hob. 208 ; Moor, 887, like point.

If an acceptance of rent of an assignee be pleaded, *quod receperunt et acceptaverunt de prædict. J S redditum sicut fertur superius reservat., viz., sex denarios de redditu prædict.* ; this is repugnant, because it is in a point perfectly material ; and it is repugnantly pleaded, because it is saying he received the whole rent, and yet received but part of it, which is in substance a different thing ; and the *sex denar.* is no surplusage, because it is the certain sum that is alleged to be accepted, and therefore the acceptance is not in the form only.

Saund. 298, 305.

If a man makes several demands in one declaration, and in the *toto se attingunt* miscasts the whole sum, and makes it more than what is contained in the several articles demanded ; this shall not vitiate the declaration, because the casting up one total is mere surplusage, and that total not agreeing with the parts, such disagreeing surplusage cannot hurt ; for it is plainly the mistake of the clerk in computing the demand aright, and not of the party in showing any particular demand otherwise than he ought.

Latch. 175 ; Noy, 44 ; Yelv. 5.

[So in debt on a simple contract the declaration hath been holden to be good, though the aggregate amount of the several sums in the different counts fell short of the sum demanded in the recital of the writ, and the breach was assigned in the non-payment of the sum demanded in the writ.

M<sup>c</sup>Quillin v. Cox, 1 H. Bl. 249.]

¶ And the same has been determined in the Court of K. B. by bill ; for in that case the proceedings being by bill, the words, “ of a plea that he render £—,” may be rejected as surplusage, there being no writ to which they have reference.

Lord v. Houston, 11 East, 62.¶

But if a man brings a plaint in an inferior court, and the declaration sets forth particular demands, which overrun the sum mentioned in such plaint, though never so little, and the jury give a verdict according to the sums mentioned in the declaration, this is erroneous ; for the plaint in that court is in nature of a writ, and is the original and foundation of the whole proceedings ; and if the declaration, verdict, or judgment, are for more than is contained in the writ or plaint, though it be never so little, by the same rea-

(I) Pleas in Bar, their Sufficiency, &c. (*Direct Pleading.*)

son they may go to larger sums *in infinitum*, and then the plaint or writ would be no direction for the future proceedings of the court.

Yelv. 5; Noy, 44; Latch. 175; and vide 1 Saund. 282, that the plaintiff may remit such overplus declared for.

¶ The rules as to avoiding surplusage first prescribe the omission of all matter *wholly foreign* to the pleading, and also of matter which does not require to be stated, though not wholly foreign. They prescribe also the cultivation of *brevity* or avoidance of unnecessary prolixity in the *manner of statement*. A terse style of allegation, involving a strict retrenchment even of *unnecessary words*, is the aim of the best practitioners in pleading, and is considered as indicative of a good school.

See Stephen on Pleading, 418, 419.

Surplusage is not however a subject for demurrer; the maxim being, that *utile per inutile non vitiatur*.(a) But when any flagrant fault of this kind occurs, and is brought to the notice of the court, it is visited with the censure of the judges.(b) They have also, in such cases, on motion, referred the pleadings to the master, that he might strike out such matter as is redundant, and capable of being omitted without injury to the material averments, and, in a clear case, will themselves direct such matter to be struck out; and the party offending will have sometimes to pay the costs of the application.(c)

(a) Co. Lit. 303 b. (b) 1 Black. 270; Cowp. 727. (c) Cowp. 727; Doug. 667; 1 Tidd, 552, (4th ed.); 1 Chit. R. 449, 450.

This is not the only danger arising from surplusage. Though traverse cannot be taken (as elsewhere shown) on an immaterial allegation,(d) yet it often happens when material matter is alleged, with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected as to be incapable of separation, and the opposite is therefore entitled to include under his traverse the whole matter alleged.(e) The consequence evidently is, that the party who has pleaded with such unnecessary particularity, has to sustain an increased burden of proof, and incurs greater danger of failure at the trial.

(d) Stephen, 256. (e) Stephen, p. 261, 262.¶

5. *That the Pleading ought to be direct and not argumentative.*

Every plea must be direct,(g) and not by way of argument or rehearsal.

Co. Lit. 303 a. β A plea setting forth the evidence of facts, instead of the facts themselves, is bad. Fidler v. Delavan, 20 Wend. 57. § (g) A plea in bar, that destroys the plaintiff's action only argumentatively, is not good. Yelv. 223. β It seems that an argumentative plea is good on general demurrer; as, where the plea averred that the defendant *had good reason to believe that the plaintiff well knew* a certain fact, is argumentatively to charge the plaintiff with knowledge. Spencer v. Southwick, 9 Johns. 314. § ¶ But an argumentative plea is aided by verdict, or on general demurrer. See 2 W. Saund. 319; Com. Dig. *Pleader*, (E) 3.¶

If a man be bound by obligation to warrant lands, and in an action on this bond the defendant plead that the plaintiff *pacificè gavisus est*, &c., this is naught, being only argumentative; for he should have pleaded, that he did warrant the lands, *et non damnificatus*.

Dyer, 42, 43; 2 Co. 3; and vide 1 Lev. 194.

To say *quod indentura testatur quod dimisit* is an ill plea; for he ought to show that he demised *de facto*.

Dyer, 118.

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In a *formodon in reverter*, the demandant counts of a gift to baron and feme in tail, and that they are dead without issue; the defendant cannot plead that the gift was to them in fee, (a) without traversing the gift in tail, being only argumentative.

2 And. 179. (a) So in a *quare impedit*, defendant cannot plead that A is incumbent, and not B, without a traverse that B is incumbent, being only argumentative, *ss.* A is incumbent, *ergo* B is not. 2 And. 179.—In trespass against divers defendants, they plead that one of the defendants was dead before the writ purchased; the plaintiff replies that he was alive; this is naught, without adding *et sic nient morte*; so if villeinage be pleaded, replication that he is frank-free, without adding *nient villein*, is naught. 19 H. 6, 4.

So if a *sci. fa.* be brought against a parson for the arrears of an annuity recovered against him, and the defendant plead that before the writ brought he had resigned into the hands of the ordinary, who accepted thereof; this is no good plea, for he ought to have pleaded that he was not parson the day of the writ brought.

7 E. 4, 16; 2 And. 179, 180.

In *assumpsit* the defendant pleaded, that the plaintiff was *alienigena in regno Franciæ sub ligeantia adversarii dom. regis. &c.*, *oriundus*, and on demurrer to this plea, the exception to it was, that this was not a direct affirmative, that the plaintiff was *alienigena*, in that it should have been *natus*, and not *oriundus*; but some precedents being cited out of Rastal, where the word *natus* was supplied with *oriundus*, the plea was held good.

4 Mod. 405, Derrier v. Arnaud.

A plea that he is now a subject, intended a natural one, and that he was always so.

Lev. 121.

In *assumpsit* against an executor on the promise of his testator he pleaded *non assumpsit*; and after verdict for the plaintiff it was objected, that it did not appear by the plea (b) who did not assume: but *per cur.*—It shall be intended of the testator, for here is no charge of any assuming by the executor.

Lev. 184, Browning v. Litton. (b) *Super se assumpsit*, without saying to whom, where the law raises the promise, will be well enough, but not in the case of a special promise. Sid. 292; 2 Keb. 57; Cro. Eliz. 703.

So in debt against an executor on the bond of his testator, the defendant pleaded *non est factum suum*; and it was adjudged that *suum* should be intended testator.

Latch. 125, Baker's case.

If a horse be taken as a stray, and the owner say, he demanded the horse *proferendo satisfactionem*, this is sufficient, and a direct affirmation, as in the case of *warrantizando vendidit*.

2 Salk. 686, Henry v. Walsh.

If a man plead that he entered *come* or as heir to such a one, this is positive enough; so if a man justify as bailiff or servant, this is not barely argumentative, but as positive and direct as if he had alleged that he was heir, bailiff, or servant.

5 H. 7, 1, 2; Dyer, 132.

If the condition of a bond be to stand to the award of J S, so that the award be made on or before the 16th of March, and no award be pleaded, and the plaintiff reply, that after the making the bond, and before the action brought *ss. prædict.* 16 *die Martii*, they made an award, the (c) *scilicet* is a

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direct affirmation that the award was made within the time limited by the condition, and may therefore be traversed.

Sand. 169. (c) The word *licet* is not a bare implicative, but is an express averment. 3 Leon. 67; Plow. 127.— *Eo quod* is an affirmative: so is *et quia quod cum*, &c., and may be traversed. Lev. 194; 1 Saund. 117.

β Facts, and not evidence, must be pleaded, or the plea will be held to be argumentative.

Church v. Gilman, 15 Wend. 650.

In debt on an award, a plea that no award was made according to the terms of the submission, is argumentative.

Bean v. Fornam, 6 Pick. 269.

An averment that the defendants set obstructions in a river to the passage of the fish, with an intention to catch the fish driven back by the obstructions, but not directly averring that they were set for the purpose of catching the fish driven back, is argumentative.

Atwood v. Caswell, 19 Pick. 493.

An averment that the plaintiff "finding it necessary," erected a gate: held, on general demurrer, to be a sufficient averment that it was necessary to erect such gate.

Spear v. Bicknell, 5 Mass. 125.

In an action on a bond conditioned to keep a fair register of warrants, &c., and return a true copy thereof, an averment that the defendant did not furnish a true copy of any register, but furnished the plaintiff with a certain false and fictitious writing, purporting to have been fairly abstracted from a fair register by him kept, is, if an assignment of a breach of a condition to keep a fair register, argumentative.

Austin v. Parker, 13 Pick. 222.g

6. *Negative Pregnant*.

It has been laid down as a rule, that every plea ought to be direct, and not by way of argument; and that therefore issue cannot be joined on a negative pregnant, or an affirmative pregnant with a negative, i. e. such a negative as supposes or implies an affirmative, or such an affirmative as implies a negative; as *ne dona pas per le fait* implies a gift by parol, and therefore the issue ought to have been *ne dona pas modo et forma*. And this kind of pleading is held to be ill on a (a) demurrer; because the plea, &c., is not a certain affirmative or negative of any single point in question; but being only an error in phrase it is aided after verdict.

Co. Lit. 126 a, 303 a; Doct. pl. 256; 2 Leon. 197; Leon. 136; Stile, 309; Bro. tit. *Negative Pregnant*, 1; Fitz. *Issue*, 88; ||Com. Dig. *Plead.* (R) 5, 6; Archb. on Pleading, 190.|| [There seems to be this sort of affinity between an argumentative plea and a negative pregnant; that as the latter is a negative pregnant with an affirmative, so is the former an affirmative pregnant with a negative; and the cure for both is, in most cases, to add, or at least to substitute, a direct denial of the substance and gist of the plea or declaration which is to be answered. 3 Reeve's Hist. 435.] (a) There must be a special demurrer to a negative pregnant, that is, a negative plea which doth also contain in it an affirmative; and to an argumentative plea, that is a plea which concludes nothing directly, but only by way of argument or reasoning; for the court will intend every plea good till the contrary appears. Lil. Reg. 427. ||See 2 Will. Saund. 319; Com. Dig. *Pleader*, (E) 3.||

In trespass for cutting his trees, the defendant pleads, that it was by the command of the lessor to give them to a stranger; the plaintiff replies, that

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he did not cut the trees by his command; this was held a negative pregnant, and that he should have pleaded *ne commanda pas*.

21 H. 6, 46, 47; Doct. pl. 256.

After issue joined the defendant pleaded a release of the plaintiff *puis darrein continuance*, the plaintiff replied that it is not his deed *puis darrein continuance*; this is a negative pregnant, because it implies the deed to be his, though not executed at the time alleged by the defendant.

21 H. 6, 9; Doct. pl. 256.

In case against an host, for that the plaintiff's goods were embezzled by his default, he pleaded, that they were not lost by his default; this is a negative pregnant, and he should have pleaded the special matter.(a)

22 H. 6, 38, 39; Doct. pl. 256. [(a) More properly the general issue.]

In case for burning the plaintiff's house by the negligent keeping of his fire, the defendant pleaded that the house was not burnt by the negligent keeping of his fire; this is a negative pregnant.

28 H. 6, 7; Doct. pl. 257, *Quære*.

If a defendant plead that the cattle died in a pound overt by the default of the plaintiff, and the plaintiff reply that they did not die by his default generally, this is a good plea; but if he say that they did not die in a pound overt, this is a negative pregnant.

5 H. 7, 9; Doct. pl. 257.

In trespass the issue joined was that J N the defendant did not disseise the plaintiff to the use of W P, &c., and held a negative pregnant; but had he pleaded *non disseisivit modo et forma*, it had been good to all intents and purposes.

3 H. 6, 37, 38; Doct. pl. 257.

In a writ of entry *sine assensu capituli*, *ne alien pas* is a negative pregnant; so of an entry for the alienation of tenant for life.

36 H. 6, 26; Doct. pl. 257.

In trespass the defendant justifies, by reason that the particular tenant alienated the reversion in fee to him; the plaintiff traverses that he did not alien in fee: this is no good issue, but a negative pregnant; for if he alienated but for another's life, his entry is lawful.

22 H. 6, 38; Doct. pl. 237.

He in reversion brings a writ of entry *in casu proviso*, upon an alienation made by the tenant for life, supposing that he has aliened in fee, which is a forfeiture of his estate; the tenant comes and pleads that he hath not aliened in fee: this is a negative, wherein is included an affirmative; for though it be true that he hath not aliened in fee, yet it may be he hath aliened in tail, which is also a forfeiture of his estate.

2 Lil. Reg. 212.

If an executor pleads several judgments, and that he hath not assets *ultra*; and the plaintiff replies they are kept on foot by fraud, and the defendant rejoins they are not kept on foot by fraud, &c., but doth not say, nor any or either of them, the rejoinder is naught, for (b) there is a negative pregnant.

Carter, 221, Warcup v. Symonds, adjudged. (b) Where a plea, that a house, &c., was not burnt for good custody of his fire, is a negative pregnant. Bro. tit. *Negative Pregnant*, 3; Fitz. *Issue*, 88.—Saying that you accepted not the obligation in satisfaction, implies that he gave you the obligation, which is a negative pregnant. Stile, 309.

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If an action of trespass be brought for entering into a man's house, and the defendant plead that the daughter licensed him to enter, by which he entered; the plaintiff reply, *quod non intravit per licentiam suam*; though this replication be a negative pregnant, (for it seems rather to confess the license than to deny it,) yet the verdict having found the license, the dubi-ousness of phrase is now removed, and the truth appears by the verdict.

Cro. Ja. 87, Min v. Cole.

¶ So where to an avowry for 120*l.* rent in arrear, the plaintiff pleaded "that the said 120*l.* was not due," and the defendant joined issue thereon: at the trial it appeared that only 24*l.* was due; upon which the plaintiff objected that the evidence did not support the issue joined by defendant, yet it was holden, notwithstanding the objection was made at the trial, and the point reserved, that the verdict for 24*l.* cured the defect in the formality of the issue.

Cobb v. Brian, 3 Bos. & Pul. 348.¶

So in debt for rent on a lease the defendant pleads *quod nihil habuit in tenementis tempore dismissionis*, and the plaintiff replies *quod habuit in tenementis*, without showing what estate; though this had been bad on a demurrer, because, by not showing what estate he had, it is pregnant of this negative, that he had not such an estate by which he had power to demise, yet after verdict it is good, where the truth appears that he had such an estate that he could demise.

Cro. Car. 312, Gill v. Glass.

In debt on an obligation to perform covenants in an indenture of lease made by the plaintiff to the defendant, whereby the defendant covenanted that he would not deliver the possession to any but the lessor, or to such persons as should lawfully evict him; the defendant pleads that he did not deliver the possession to any but such as lawfully evicted him: and on demurrer to this plea it was objected that the same was ill, and a negative pregnant; and that he ought to have said, that such a one lawfully evicted him, to whom he delivered the possession; or that he did not deliver the possession to any: but the court held the plea pursuing the words of the covenant good, being in the negative; and that the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him.

Lev. 83, Pullen v. Nicholas.

7. *What Things must be pleaded according to their Operation in Law.*

¶ In pleading any contract in writing, it is sufficient to set it forth according to its legal effect.

Grannis v. Clark, 8 Cowen, 36.

Writings should be declared on according to their legal effect, and not set forth in the precise words.

Churchill v. Merchant's Bank, 19 Pick. 532; Dorr v. Fenno, 12 Pick. 521; Lent v. Padelford, 40 Mass. 230; Hopkins v. Young, 11 Mass. 302.¶

The grant or conveyance of one joint-tenant to his companion must be pleaded as a release; for one joint-tenant cannot enfeoff his companion, because they are already both seised *per mie et per tout*; and this manner of conveyance passing by livery cannot operate so as to give him what he already has: but, though a release be the proper conveyance from one joint-tenant to another, yet if the jury find that the one joint-tenant did grant or convey to another, this amounts to a release; for they having found the sub-



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stantial part, the court is to apply the words according to the operation they have in law: but every such conveyance must be pleaded as a release.

Co. Lit. 193 b, 200 b; Sid. 452; 2 Sand. 96; Vent. 78; Raym. 187.

So if tenant for life grant his estate to him in reversion, this is a surrender, and must be pleaded accordingly, being the operation it hath in law.

4 Mod. 151; Comb. 190.

If J S plead the grant of a rent from his father in this manner, viz.: that in consideration of love and affection, and *5l.*, he *concessit et assignavit, &c.*, and there is neither attornment nor enrolment of the deed; this cannot pass as a grant at common law, nor as a bargain and sale for want of enrolment; and though it (a) amount to a covenant to stand seised, being in consideration of love and affection, yet it ought to have been (b) so pleaded, being the operation it hath in law.

2 Vent. 149, 260, 266, *Leade v. Baker and March*; 4 Mod. 149; 3 Lev. 241, S. C.; [2 Saund. 97 b, n. (3); 1 Marsh. R. 217.] (a) A man may bargain and sell to his son, but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of a bargain and sale; yet if it hath not, and the consideration of love and affection is expressed, it will amount to a covenant to stand seised. 7 Co. 40; *Bedel's case*; 2 Co. 24; Cro. Eliz. 394; and vide Vent. 137; Lev. 56; Mod. 173, *Cross v. Scudamore*. (b) The word *dedi* or *concessi* may amount to a grant, to a feoffment, to a gift, lease, release, confirmation, or surrender; and it is in the election of the party to use it to which of these purposes is most agreeable to his interest, and therefore he may plead it as either. Co. Lit. 301 b; 4 Mod. 150 cited.

All necessary circumstances implied by law in a plea need not be expressed; as, in pleading a feoffment, livery and attornment are implied; *secus*, in a grant.

Co. Lit. 303; Yelv. 135; Plow. 149, 150.

In pleading a countermand to a submission to arbitration, it need not be alleged that the party gave notice to the arbitrators, for without that it is no countermand; and therefore if no notice be given, issue may be joined upon the point, *quod non revocavit*.

8 Co. 82.

If a disseisee plead that he could not enter for fear, he must show some just cause of fear, that the court may judge of the reasonableness of an apprehension of danger to his person; but in a special verdict, if the jurors find that the disseisee did not enter for fear of corporeal hurt, it is sufficient, and it shall be intended that they had evidence for what they find.

Co. Lit. 353 b.

The defendant made conusance as bailiff to Jane Griffith, that Robert Griffith was seised in fee, and devised to Thomas Griffith in tail, and that a common recovery was suffered against him, to the intent that Jane should have a rent of 40*l. per annum* after the death of Thomas; and that there was a deed for the recovery declaring the uses, &c., which was held to be ill pleaded; for he should not have set forth the deed, but have pleaded according to the construction of law, that the recovery was to such uses at the time.

Comb. 403; Ld. Raym. 154; 2 Salk. 676, pl. 3; Carth. 411, *Trygarn v. Fletcher*.

The admittance of a copyholder, as well upon a descent as surrender, may be pleaded as a grant, to avoid the inconvenience which would follow if the copyholder should be forced in pleading to show the first grant; for that

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was either before the time of memory, and so not pleadable, or within the time of memory, and (a) then the custom fails.

4 Co. 22. (a) That he was seised *secundum consuetudinem manerii* does not necessarily import a copyhold. 3 Bulst. 230; Roll. R. 211; 2 Vent. 144.

So he may allege the admittance of his ancestor as a grant, and show the descent to him, and that he entered, without showing any admittance of himself.

4 Co. 22 b.

But he cannot plead, that his father was (b) seised in fee at the will of the lord by copy of court-roll of such a manor, according to the custom of the manor, and that he died seised, and it descended to him; for in truth his interest in judgment of law is but a particular interest at will.

4 Co. 22. (b) Without showing of whose grant, Cro. Ja. 103, adjudged naught upon a general demurrer, Cro. Car. 190, *per totam curiam*; though the son had there shown, that after the descent he was admitted; but by three judges, it is but a fault in form, and the issue being taken upon a collateral matter, and found for the plaintiff, it is helped by the statute of jeofails.—But if A pleads the grant of the reversion of a copyhold after the death of B, tenant for life, he need not show the beginning of the estate of B, nor by whom granted; for it is not the title of A, but matter of inducement only. Cro. Ja. 51; 2 Vent. 182.

If one license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a license; and if it be pleaded as a lease for years, and traversed, the lessee may give the license in evidence to prove it.

Hard. 366; 2 Lev. 194; vide tit. *Leases*.

If an obligee in a bond covenants not to sue the obligor, this amounts to a release, and may be pleaded as such; but, if the covenant is that he will not sue him before such a day, this rests only in covenant, and the party, if sued, can only have an action of covenant.

And. 307; Cro. Eliz. 352; Roll. Abr. 939, *Dowse v. Jeffries*.

A having a rent-charge issuing out of three acres, B purchased two acres thereof, and A covenanted and granted to and with B, not to distrain in these two acres for the rent. Glanvil, contrary to Anderson, held it a release; and the court held, that if it be a release, the tenant of the other acre may plead it, for thereby the rent was extinct.

Noy, 5; Show. 321, S. C. cited.

If two are bound in an obligation, and the obligee releases to one of them, provided the other shall not take benefit of this release, the proviso is void, and the other shall take advantage of the release if he can get it to show.

Lit. R. 190, *Everard v. Herne*.

If two are jointly and severally bound in an obligation, and the obligee by a deed covenants and agrees not to sue one of them, this seems to be no release, but that he may sue the other.

Cro. Car. 551; March, 95, *Dennis v. Pain*; [Dean v. Newhall, 8 Term R. 168, *acc.*]

If the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in suit; this is only a covenant, upon which an action will lie, but it cannot be pleaded in bar of the bond: but where the covenant is, that the obligee will not at any time hereafter put the bond in suit; such covenant is pleadable in bar as a release; and in the

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argument of this case it was allowed by all, that if a letter of license contains the following words, viz.: that if the creditor sues within such a time his debt shall be forfeited, such license is pleadable in bar.

Carth. 63, 64; 2 Salk. 573, pl. 1; Show. 46, *Ailoffe v. Scrimshire*; [1 Term R. 446.]

8. Of *Colour* in Pleading.

*Colour* is a feigned matter, which the defendant or tenant useth in his bar when an action of trespass or an assize is brought against him, in which he gives the demandant or plaintiff a show that he hath a good cause of action, whereas in truth he hath not, but only a colour and face of a cause; and it is used to the end that the determination of the action should be by the judges, and not by the jury, and therefore colour ought to be matter of law, or doubtful to the *lay* *gents*.

2 Lil. Reg. 273. Vide 10 Co. 91, in *Dr. Leyfield's case*. [See 3 Reeve's Hist. 438.]  
[Stephen on Pleading, 225, 231.]

In an assize, when the defendant pleaded only a colourable bar, that is, such a bar as showed some title in the demandant, they proceeded to take the assize at large, which was in this manner: the assize showing no title in the plaintiff, the defendant would show his own enfeoffment or investiture, but because such feoffment was only evidence that there was no disseisin, it would amount to the general issue without colour; and therefore the defendant urged, that the plaintiff obtained by virtue of an investiture, on which the ceremony of livery had never passed, and the validity of such investiture, being a question of law, was not to be answered by the jury, and therefore the plea of his own investiture, which alone would have been only evidence of no disseisin, joined to the plaintiff's title, which turned on a question of law, drew the cause from the jury to the court; and this obliged the plaintiff to show by what investiture he claimed, and then the assize was taken at large on the title of the plaintiff; which was done that the plaintiff's title might appear on record, and the plaintiff be confined to give evidence touching that title, that the jury might not wander from that evidence; and that if they did, they might the more easily be convicted in an attainder.

2 Inst. 411; Booth, 214; 10 Co. 90; Doct. pl. 72, &c.; 10 Co. 91.

In an assize, if the tenant pleads that he demised the lands to the demandant for years, this is no good plea; because the complaint is of a disseisin of a freehold, and the tenant gives the demandant no colour to have an assize.

Keilw. 103.

If in an assize the tenant pleads in bar that his father was seised and died, and that he as son and heir entered, and gives colour to the demandant; and he replies, that he himself was seised till by the father of the tenant disseised, and that he made continual claim, and after the death of the father re-entered, and was seised till, &c., it is a good replication, and yet his title is founded on his own possession only.

Keilw. 103.

In trespass, if the defendant justifies the taking of the cattle damage feasant, he need not give any other colour to the plaintiff; for by this justification he acknowledges the property to be in him.

Co. Ent. 659; Doct. pl. 73.

||In trespass *quare clausum fregit*, where the defendant justifies under a possessory title derived from another, as, *e. g.*, under a demise, it is neces-

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nary to give colour to the plaintiff, otherwise the plea amounts to the general issue; for it shows the right of *possession* to be in the defendant and not in the plaintiff; but as this defence may be given in evidence on the general issue, it is not very frequently pleaded. However, where a damage to personal property is to be justified, as cutting and removing posts, rails, &c., there it must be specially pleaded, and colour given.

Com. Dig. *Pleader*, (3 M) 40, 41; 7 Term R. 354; 8 Term R. 406; 1 East, R. 215; Welsh v. Nash, 8 East, 394.¶

In ejectment the plaintiff's title in his declaration must be answered; and it is not sufficient barely to give colour, as in trespass, or an assize.(a)

Dyer, 365; Co. Ent. 79; Rast. Ent. 254. (a) In ejectments the modern practice is, to plead the general issue, the defendant entering into a rule to confess lease, entry, and ouster, by which means the title only is in question between the parties.

Colour ought to have the following qualities: 1st, It ought to be a matter doubtful to the jury; as where the defendant says that the plaintiff comes by colour of a deed of feoffment, where nothing passed by the deed; this is a good colour, being a doubt to the *lay gents* whether the land passed by this feoffment without livery. 2dly, It to have continuance, though it wants effect; as, where the defendant gives colour by colour of a deed of demise to the plaintiff for the life of J S, who before the trespass was dead; this is not any colour, for this doth not continue; but he ought say, that he claims by virtue of a deed of demise made to him for his life where nothing passed by that. 3dly, It ought to be such colour as, if it were effectual, would maintain the nature of the action as, in assize, to give colour of freehold, &c.

10 Co. 88.

In trespass if the defendant pleads a fine *sur consuance de droit*, levied by the ancestor of the demandant, he shall not give colour although this be but executory; otherwise, if he pleads that his ancestor granted the reversion after an estate for life or years.

Rast. Ent. 277; Co. Ent. 673; 10 Co. 90.

The reason why colour shall be given in a writ of entry, *sur disseisin*, writ of entry in nature of an assize, trespass, &c., is to make certain issue; but when the special matter of the plea totally bars the plaintiff, no colour is necessary; and therefore in pleading a warranty, an estoppel, or fine with proclamations, no colour is necessary.

10 Co. 90; Doct. pl. 77.

When a man pleads to the writ, or to the action of the writ, no colour shall be given.

22 H. 6, 50.

Where the defendant entitles himself by act of parliament, no colour is to be given.

Doct. pl. 77.

Where letters patent are pleaded, the defendant ought to plead colour by former letters patent in this form, *scilicet colore quarundarum literarum patentium fact. prædict.* the plaintiff, &c., *ubi nil transivit*, and not that the plaintiff claims *colore concessionis sive dimissiones*, &c.

10 Co. 90; Doct. pl. 77.

He who justifies for wreck, waifs, strays, need not give colour.

Doct. pl. 78

(I) Pleas in Bar, their Sufficiency, &c. (*Colour.*)

So he who justifies for tithes shall not give colour; for although any person severs them from the nine parts, yet they belong to the parson.

10 Co. 91.

In trespass, if the defendant pleads that the freehold is in J S, or that J S is seised in fee as of his demesne, and that he by the command of J S, &c., he need not give colour; for though the fee or the freehold be in J S, yet the plaintiff might have an interest for years, as a lease in the premises. But where the defendant makes a special justification in him in whose right as servant, &c., there he ought to give colour; as if he pleads that J S was seised, and enfeoffed him, in whose right, &c., there he ought to give colour; for in this case it cannot be presumed that the plaintiff has any interest in the land.

22 H. 6, 50; 18 E. 4, 3; 10 Co. 89 b. That if in trespass the defendant justifies as servant to J S he need not give colour. Lutw. 1343; and vide Cro. Eliz. 76.

In forcible entry the defendant may plead that he was seised until dis-seised by the plaintiff, and this is good without giving colour.

Rast. Ent. 62; 21 H. 6, 39.

In assize the defendant justifies by virtue of a lease for years, he need not give colour, inasmuch as he does not plead in bar of the assize, nor does he take the freehold on himself.

Dyer, 246.

In trespass the defendant pleads that the plaintiff claims *colore feoffamenti*, by which nothing passed, this is not good colour, for he ought to have pleaded *colore chartæ feoffamenti*.

2 Roll. R. 140.

Where the defendant derived a title to himself by divers mesne conveyances, and gave colour to the plaintiff by one who was last named in the conveyance, this was held naught, and that he should have given colour by him who was first named in the conveyance.

2 Roll. R. 140.

In trespass for entering the plaintiff's house, and taking and carrying away his goods, the defendant pleaded that, before the trespass supposed, one A was possessed of the said goods, and the said goods being in the house of the plaintiff, the said A sold them to the defendant, by force whereof he was possessed, and being so possessed came to the plaintiff's house, &c., and by assent and license of the plaintiff's wife he entered into the house, and carried away the goods; and this plea was held naught, there being no colour given the plaintiff, and the license given by the wife not material, nor sufficient for justifying an entry: but in this case it was held that the want of colour is but matter of form, which must be taken advantage of on demurrer.(a)

3 Leon. 266, Taylor v. Fisher. [(a) Want of giving colour is aided after verdict by 39 H. 8, c. 30. Vide 1 Saund. 228.]

In trespass for taking and carrying away a hundred loads of wood the defendant justifies, for that J S was possessed of them *ut de bonis propriis*, and the plaintiff claiming them by colour of a deed of gift afterwards made, took them, and the defendant retook them; and it was thereupon demurred, because the colour given to the plaintiff is a good title for the plaintiff, and confesseth the interest in him; for colour ought to be such a thing which is a good colour of title and yet is not any title; as a deed of a lease for life, because it hath not the ceremony of livery; so the grant of the reversion is

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not good without attornment: but a deed of goods and chattels, without other act or ceremony, is good; so of colour by a lease for years, or by letters patent.

Cro. Ja. 122, Radford v. Harbyn.

### 9. Of Pleading *Non-tenure*, and Disclaiming.

The plea of *non-tenure*, or that the defendant holdeth not the lands mentioned in the plaintiff's count or declaration, is chiefly used in (a) real actions, and is said to be general or special: general, where the party denies ever to have been tenant to the lands in question; special, where he alleges that he was not tenant at the time of the writ purchased.

Doct. pl. 129; Bridg. 72, 73; Dyer, 227. [Vide Archb. on Pleading, 281, 282.] (a) So, in debt on a lease, *non-tenure* is a good plea. 4 H. 6, 5; Doct. pl. 129.

At common law, (b) if the tenant had pleaded *non-tenure* as to part, it would have abated all the writ; but by the statute of 25 E. 3, c. 16, it is enacted, that by the exception of *non-tenure* of parcel, no writ shall be abated, but only of that parcel whereof *non-tenure* was alleged.

(b) 36 H. 6; 6 Mod. 181.

When the tenant pleads *non-tenure* to the whole lands demanded, he need not set forth who is tenant; but when he pleads *non-tenure* as to part, he must set forth who is tenant of the other part, and must (c) aver that he himself was not tenant *die impetrationis brevis*.

Doct. pl. 128. (c) Pleading *non-tenure* at the time of the writ purchased is sufficient, without adding *nec unquam postea*. Doct. pl. 128.—with what certainty, Mod. 181.

If issue be joined on a plea of *non-tenure*, and it be found by verdict that before the writ purchased the tenant enfeoffed divers persons with an intent to defraud him who had cause of action, and notwithstanding still took the profits; this finding is sufficient to entitle the demandant, the feoffment being void by the statute 13 Eliz. c. 5. (d)

Cro. Eliz. 233, Leonard v. Bacon. (d) For which vide tit. *Fraud*.

If a formedon be brought of 140 acres lying in three vills, and the tenant plead *non-tenure* of 100 acres, he need not set forth in which of the vills the 100 acres lie.

Mod. 181, Fowle v. Doble.

If on a plea of *non-tenure* for the whole the writ abate, the demandant shall not have a new writ by journies accounts; otherwise if it abate only on a plea of *non-tenure* for part.

6 Co. 10 a; Doct. pl. 129.

In a *præcipe*, after joint-tenancy pleaded, the defendant, to another writ, cannot plead *non-tenure*, for by his former plea he hath affirmed himself to be tenant; but had the first writ been brought against a husband, and the second against the husband and wife, she might have pleaded *non-tenure*, being a stranger to the first action.

36 H. 6, 2; Doct. pl. 128.

In a writ of entry in the nature of an assize against husband and wife, the husband says, that the wife was not tenant of the land the day of the writ purchased, *nec unquam postea*, and held a good plea.

Doct. pl. 129; 10 H. 6, 22.

As to *non-tenure's* being a plea in bar or in abatement, this difference

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hath been taken, viz., that *non-tenure*, which goes to the *tenure*, as when the tenant denies that he holds of the demandant, but says that he holds of some other person, is in bar; but *non-tenure*, that goes to the *tenancy* of the land, as where he pleads that he is not tenant of the land, goes in abatement only.

Mod. 250; *β* *Ottis v. Warren*, 14 Mass. 239. See *Keith v. Swan*, 11 Mass. 216.*g*

A general *non-tenure* is not a good plea to a *scire facias* upon a judgment in a personal action, because it falsifies the plaintiff's return; but in a *scire facias* to have execution of a judgment in a real action one may plead *non-tenure* against the return of the sheriff, because of the high regard the law has to the freehold.

2 Roll. R. 54; Roll. R. 302; Cro. Eliz. 872; 6 Mod. 226; 2 Ld. Raym. 854; Salk. 40, pl. 9; 2 Salk. 679, pl. 7.

But a special *non-tenure* may be pleaded to a *scire facias*, upon a judgment in a personal action; as, to a *scire facias* on a judgment for debt or damages against tenant for years, he may plead that he has only a term for years.

Owen, 134; 3 Lev. 205.

In a formedon in reverter, if the tenant pleads *non-tenure* generally, the demandant may maintain his writ, that he is tenant, though he can recover no damages; adjudged by all the court, and that Lit. and Co.(a) were not to be intended of a simple plea of *non-tenure*, but of *non-tenure* with a disclaimer, as the pleadings were usually in Littleton's time; for upon the simple plea of *non-tenure*, supposing the tenant hath no freehold but a reversion in fee, the demandant shall not be restored to the fee, for nothing is disowned by the simple plea of *non-tenure* but only the freehold, which may be true, and yet he may have the reversion in fee; but when the tenant disclaims, or pleads *non-tenure* and disclaims, the defendant shall be restored to the whole, because he hath disclaimed the whole.

3 Lev. 330, *Hunlock v. Peter*. (a) Co. Lit. 102, 361.

*β* By the practice of Massachusetts, a disclaimer may be pleaded in bar. *Prescott v. Hutchinson*, 13 Mass. 439.*g*

## 10. Pleading Hors de son Fee.

*Hors de son fee* is an exception to avoid an action brought for rent-services, &c., issuing out of lands by him who pretends to be the lord; for if the defendant can prove that the land is without the compass of his fee, the action falls.

Doct. pl. 216; Bro. tit. *Hors de son Fee*; And. 227.

If the writ comprehends certainty of title, as in *mort d'ancestor*, formedon in the descender or remainder, *hors de son fee* is no plea; otherwise in a writ of entry *sur disseisin*; or in an assize of rent; but in an assize, if the party makes title, *hors de son fee* is no plea.

Bro. *Hors de son Fee*, pl. 9; 5 E. 4, 6; 27 H. 8, 7; Dyer, 311.

In trespass or rescue *hors de son fee* is no plea, without showing of whom the land is held.

6 E. 4, 4; Doct. pl. 216.

In a cessavit *hors de son fee* is no good plea, because the tenure is traversable.

2 Inst. 296.

If a stranger claims seignior, and distrains, and avows for the services,  
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the tenant may plead that the tenancy is *extra feudum*, &c., of him, that is out of the seignory, or not bounden of him: but he cannot plead *extra feudum*, &c., unless he takes the tenancy upon himself.

Co. Lit. 1 b; 1 Mod. 164. cited, and there said by the C. J., that this rule is to be intended in cases of an assize, and so were all the books cited in Co. Lit. for proof of this opinion.

In an avowry the tenant cannot plead *ne unques seise* of such services generally, because he leaves no remedy for the lord either by avowry, or by writ of customs or services; and therefore, if he is a tenant in fee-simple, he ought either to disclaim or plead *hors de son fee*.

9 Co. 24 b.

If in trespass (a) for taking goods the defendant justifies by command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for non-payment of the rent he took them *nomine districtionis*; the plaintiff may reply, that the *locus in quo est extra, ubique hoc, quod est infra feudum*, &c.; adjudged upon a special demurrer, it being shown for cause that the plaintiff had not taken the tenancy on himself.

2 Mod. 102, 104, *Sherrard v. Smith*. (a) So, in an avowry a stranger may plead generally *hors de son fee*, and so may tenant for years. 2 Mod. 104, *per cur.*

## 11. Estoppels in Pleading.

There are three several kinds of estoppels, by matter of record, by matter in writing, and by matter in *pais*. 1st, By matter of record, viz. by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. 2dly, By matter in writing, as by deed indented, by making an acquaintance by indenture or deed-poll, by defeasance by indenture or deed-poll. 3dly, By matter in *pais*, as by livery, by entry, by acceptance of rent, by partition, by acceptance of an estate.

Co. Lit. 352 a.

Every estoppel, because it concludes a man to allege to the truth, must be certain to every intent, and is not be taken by argument or inference.

Co. Lit. 352. Every estoppel ought to be a precise affirmation of that which makes the estoppel. Co. Lit. 305. — Estoppels are odious in law; and although all parties to an indenture are bound by the words thereof, because they agree to it, yet that must be intended of material words, and not of all minute and descriptive words and circumstances. — A matter alleged that is not traversable shall not estop; [and the party must conclude his plea or replication relying on the estoppel, otherwise he will not have the benefit of it. 1 Saund. 326, n. (4). As where in debt for rent on a demise by indenture by one who has nothing in the land, the defendant pleads *nil habuit in tenementis*; if the plaintiff replies that he had a sufficient estate to make the demise, he loses the benefit of the estoppel; but if he replies that the lease was by indenture, and concludes *unde petit judicium*, and the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture, defendant shall be estopped. Lord Raym. 105; 1 Salk. 277; 6 Term R. 62;|| Co. Lit. 352 a. An estoppel is not taken notice of unless relied on in pleading. Mod. 201. An estoppel cannot be pleaded with a traverse. 2 Mod. 37.

By matter of (b) record all parties are estopped, so that a man shall not be received to take an averment (c) directly contrary to a record.

¶ II. 6, 60. (b) If a deed be enrolled of record the party is estopped to say that it is not his deed, or that it was not acknowledged by him. Leon. 184; 3 Leon. 84; Comb. 948; and vide title *Bargain and Sale*. (c) If one of my name levies a fine of my land, I may confess and avoid the fine by showing the special matter which stands with the fine. Cro. Eliz. 531; and vide tit. *Fines*. — Where one shall be estopped by that a writ issued after the *teste*. Lutw. 334. — But whether it may not be und by verdict, vide Lev. 173; Sid. 271; 1 Keb. 930; 2 Keb. 32, *Bayley v. Bun-*



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*ning.* [In the case of Combe and Pitt, it is settled that the actual day of suing out the writ may be shown in pleading. 3 Burr. 1423, &c.]—Whether the defendant shall be estopped to say that the plaintiff's testator was dead when a writ was sued out in his name. Lutw. 254.—Where one shall be estopped by praying over of a record or deed. Lutw. 1644; Salk. 7, pl. 17.

When the truth is apparent in the same record, the adverse party shall not be estopped to take advantage thereof, for he cannot be estopped to allege the truth when it appears of record.

Co. Lit. 362 b.

If A B is outlawed by the name of A B, Esq., and comes in *gratis*, and reverses it for want of proclamations, he shall not be estopped to say afterwards that he was a knight and no esquire.

Stile, 396, Bayle v. Scarborough.

If one puts in bail by a wrong name, (a) he shall be concluded thereby, as was agreed *per cur.* in the case of (b) Smith v. Villars; and in a civil action he need not join in the recognisance; and in the case of the Earl of Banbury, who was indicted by the name of George Knowles, Esq., though by the course of the court he ought to have joined in the recognisance; yet because if he had entered into one by the name of G K it would have been an estoppel upon him, he was indulged to bring others who gave bail for him by the name of G K, Esq., for their act could not conclude him. (c)

(a) 7 Mod. 38; Salk. 2 pl. 7, S. C. (b) But then it must be pleaded as an appearance. Salk. 8, pl. 19. (c) *¶ Sed vide infra*, and 2 New R. 453.]

Where one brought a writ of error upon judgment in dower against him, and assigned for error that he was within age, (d) and appeared by attorney, and issue being joined upon the nonage, and found for the plaintiff in error, the defendant therein would have stayed judgment, because in the assignment of error it was alleged that 7 Sept. 20 Car. 2, he was of the age of fourteen *et non amplius*, and the writ of error was brought 4 July, 26 Car. 2, and in Michaelmas term following, and error assigned by attorney, when he could not be of the age of twenty-one, according to his own allegation; but the substance of the issue being whether he was within age, and the viz. no material part of the issue, it was held no estoppel.

2 Jon. 170; Skin. 10, pl. 10; Raym. 456, Morgan v. Vaughan. (d) If infant plaintiff appears by attorney and has verdict, judgment not to be reversed, 21 Ja. 1, c. 13.

Matters alleged by way of supposals in counts shall not conclude or estop, otherwise it is after judgment given; and though after nonsuit the supposal in the count shall not conclude, yet the bar, title, replication, or other pleading of either party, which is precisely alleged, shall conclude after nonsuit. (e)

Co. Lit. 352. (e) If plaintiff is nonsuit, is he not in the same situation as if he had never instituted the suit; and does not a plaintiff frequently submit to a nonsuit for the purpose of bringing another action, in which the former record cannot be given in evidence?—Lord Coke can only mean in those cases where a nonsuit is peremptory, which are very few, as in appeals in *favore vitæ*, &c. &c., and in attain, &c., after appearance.

¶ Where a verdict has been found on any fact, or title, distinctly put in issue in an action, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, respecting the same fact or title.

Outram v. Morewood, 3 East, 486.

But the estoppel should be specially pleaded; for if the defendant gives

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the former verdict in evidence on the general issue, it is not conclusive, but only evidence to go to the jury.

*Vooght v. Winch*, 2 Barn. & A. 662.¶

Regularly, a stranger shall not be bound by nor take advantage of an estoppel.

Co. Lit. 352 a.

Privies in blood, as heir; privies in estate, as feoffee, lessee, &c.; privies in law, as lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law or in the post, shall be bound by and take advantage of estoppels.

Co. Lit. 352 a.

Where the record of the estoppel runs to the disability or legitimation of the party, there all strangers shall take benefit of that record, as, outlawry, excommungement, profession, attainder of *præmunire*, bastardy, mulierty, and it shall conclude the party, though they be strangers to the record.

Co. Lit. 352 a; Keilw. 180.

But of a record concerning the name of the person, quality, or condition, no stranger shall take advantage, because he shall not be bound by it.

Co. Lit. 352 a; Keilw. 96, 180.

¶ A defendant is however estopped by the recognisance of bail entered into for him by the name in which he is sued, from pleading a misnomer, although he himself be no party to the recognisance.

¶ *Meredith v. Hodges*, 2 New R. 453.

So where the defendant described himself in a bond as T B, of C, in the county of N, and in an action on the bond, was outlawed, it was held, that he was estopped by his description in the bond from assigning, as error to reverse the outlawry, that he was not of C in the county of Northumberland, and that there was no such place as C.

*Bonner v. Wilkinson*, 5 Barn. & A. 682.¶

If A leases by indenture to B, to begin after the expiration of a lease to D, in covenant brought by B against A, he is estopped to say there is no such D; and though the common rule is, that a recital is not an estoppel, yet where the recital is material, as here, it is otherwise.

2 Leon. 11. Vide Vent. 84; Vaugh. 82.

If by indenture between A and B, reciting that A was seised in fee of certain lands, A, in consideration of a marriage to be had between her son and B, grants a rent out of those lands to B to begin after the death of her son, and covenants to pay it; in an action against A upon this covenant she cannot plead that she had nothing in the land at the time of the covenant, but that a stranger was seised thereof, both because she was estopped by the deed, and the covenant extends to it as an annuity.

Allen, 79, *Newton v. Weeks*.

If A being a lessee for years makes an under-lease to B by indenture, and B covenants with A to perform all the covenants in the original lease to be performed by A, his executors, &c., in an action upon this covenant B will be estopped to say there are no covenants in the original lease.

Hil. 7 G. 1, in *B. R., Atkinson v. Coatsworth*; and vide Show. 58; Carth. 76; Holt, 210, pl. 1.

If the condition of an obligation be to perform all covenants contained in

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such an indenture, in debt upon the obligation the defendant (a) cannot say there is no such indenture, because he is estopped.

Roll. Abr. 408, 872; Juel's case, Cro. Eliz. 577, L. P.; Sand. 316; Mod. 15, L. P. [Hosier v. Searle, 2 Bos. & P. 299.] (a) But he may say there are no covenants. Mod. 15.—But then he will confess the obligation to be single, and the plaintiff upon demurrer setting out the covenants shall have judgment. Lev. 3, adjudged; and vide Lev. 45; Raym. 27; 1 Saund. 317. [As to the estoppel of a tenant from pleading *nil habuit in tenementis*, vide *ante*, p. 548, note.]

{A party executing a deed is estopped by the recital of a particular fact in that deed to deny such fact. Therefore where it was recited in the condition of a bond that the obligor had received divers sums of money for the obligee which he had not brought to account, but acknowledged that a balance was due to the obligee, it was holden that the obligor was estopped to say that he had not received any money for the use of the obligee.

Willis, 9, Shelly v. Wright; Ibid. 25, Cossens v. Cossens.}

If the condition of an obligation hath reference to a particular to be done, or in which a generality is to be done, the obligor shall be estopped by it to say, that there is no such particular thing; as, if the condition of an obligation be to release all the right that he hath for life in Black Acre, he shall be estopped to say, that he hath not any right for life in Black Acre, because this contains a particular.

Roll. Abr. 872, 873.

But, if the condition of an obligation contains (b) a generality, a man shall not be concluded to say, that there is no such thing; as, in debt upon an obligation, of which the condition is to perform all agreements now set down by J S, the defendant may say, that no agreement was then set down by J S, because this comprehends a generality.

(b) For this diversity vide Cro. Eliz. 362; Owen, 110; Poph. 114; Moor, 405; Brownl. 117; Yelv. 226; 2 Bulst. 19; Latch, 125; Cro. Ja. 375; Dal. 28; Show. 59.

If the condition of an obligation be to pay (c) all sums of money in which T S stands bound by his deed obligatory to T H, of and for the behoof of the children of W S according to the will of, &c., he shall be estopped to say, that T S never stood bound by any deed obligatory for the use of the children of W S.

Dyer, 3; Savil, 90. (c) So, if the condition be to pay all such sums as he was bound to pay by his several obligations, according to Moor, 23, pl. 79; but in Dal. 28, it is a *qu.* being general.

In debt upon a bond conditioned to pay (d) all legacies that J S had given by his will, the defendant shall be estopped to say, that J S made no will; but he may say that J S gave no legacy by his will.

Moor, 420, pl. 578, Paramour v. Daring. [See 1 Will. Saund. 215, note 2.] (d) Where the condition was to give J S all the goods bequeathed to him by his father, the defendant shall be estopped to say he had no goods bequeathed. Godb. 177.

In debt upon an obligation conditioned for payment of 37*l.* for rent reserved on a demise of copyhold lands for 40 years, according to such articles indented, the defendant shall be estopped to say he had nothing in the lands demised; though objected, if he had nothing in the land then he ought not to be paid the rent.

Cro. Eliz. 362; Poph. 114; Moor, 405; Owen, 110, S. C., Stroud v. Willis.

In an action upon a bond conditioned to pay 10*d.* weekly for keeping a bastard, according to an order made by the justices, the defendant is estopped to say, there is no such order.

Noy, 79; Latch. 125, Germin v. Randall.

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In debt upon a bond, conditioned that (a) whereas A had commenced several suits in the K. B. against B, if B should appear, and make answer thereto, then, &c., the defendant cannot say that B appeared, and was ready to answer, but there was no action there depending against him, for he is estopped so to say.

Cro. Eliz. 756; Dyer, 196, S. C. in margin, Willoughby v. Brook. (a) Where it was recited that J S claimed to have a lease, and the condition was to save harmless from all claims of J S, the defendant could not plead J S had no lease. 3 Leon. 108.

In a debt upon bond, conditioned that whereas the plaintiff had carried 12,000 billets for the defendant to D, if the defendant should pay the plaintiff after the rate of 17s. per 1000; then, &c., the defendant cannot plead that the plaintiff did not carry 12,000 billets to D, for he is estopped to deny it.

Allen, 52; Stile, 103, S. C., Hart v. Buckminster.

If in an action upon a bond against one as executor of Edmund Shephard, upon *oyer* prayed, it appears, that the words are *me Edwardum* (b) *S. teneri*, &c., and that he subscribed it by the name of *Edm. S.* (which was his true name,) and upon *non est factum testatoris* pleaded it is found to be the deed of the said *Edm. S.*, yet the plaintiff shall not have judgment, the truth appearing on the record; for *Edward* and *Edmund* are two distinct names, and the (c) subscription by the name of *Edm.* being no part of the bond, is not material.

Cro. Ja. 640; Godb. 233, S. C., Manby v. Shephard. (b) The declaration might have been with an *alias*, or that *Edmund* by the name of *Edwardum* bound himself, or he may be estopped. Vide *infra*. (c) That if a man binds himself by a wrong name, he shall be estopped to avoid it. Vide Dyer, 279; Leon. 322; Moor, 897; Cro. Ja. 261, 558; Lutw. 894, and title *Misnomer*.

If A gives a bond by the name of B, and is sued by the name of B and pleads the misnomer, the plaintiff may reply that he made the bond by the name of B, and estop him by demanding judgment, if against his own deed he shall be admitted to say his name is A.

Salk. 7, pl. 17, Linch v. Hook.

|| So where in an original, the defendant was described as T B of C., in the county of N, and upon a writ of error being brought to reverse the outlawry, the error assigned was, that T B was not before, or at the time of the original writ of, or, commorant in C, and that there was not any town, hamlet, or place of the name of C in that county; plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare on a bond of defendant, in which he was described as T B of C, in the county of N:—held that this was an estoppel.

Bonner v. Wilkinson, 5 Barn. & A. 682.||

If A enters into a bond to B, conditioned that A shall use and maintain C his wife; in an action upon this bond A shall not be estopped to say that B was married to D (who is yet living) before she married A, and so A cannot use and maintain her as his wife, for he confesses and avoids, because she might notwithstanding be called in common speech or named his wife in writing.

Mich. 39, Eliz. Prat. v. Phanner.

If, in an action for 5*l.* by the lessor upon a covenant to pay so much for every acre of meadow ploughed, he lays the ploughing of an acre of lands called Lane's Meadows, (there being other meadows leased,) the defendant may plead that the lands there called Lane's Meadows, are not meadow,

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but time out of mind arable: for though all parties to an by the words thereof, yet it must be intended of matter such as are descriptive only; and if the closes had been 1 ing 500 acres, yet the defendant would not have been estop were not so many.

Mich. 11 G. 1, in *B. R., Skipwith v. Green.*

If one gives an acquittance under his hand and seal (a) for a day, he shall be estopped thereby to demand rent due at a day b

Lev. 43; Sid. 44; Raym. 21, S. C., *Palmer v. Stannage*, and 3 Co. 65; Dyer, 271; And. 14; Bendl. 186; Moor, 87, L. P. (a) If not under his hand and seal it is no estoppel, but evidence only. Comb. 59.

But yet if one avows for rent due at a day, he shall not be estopped to (b) avow for rent due at a day after.

Lev. 43. (b) May have covenant after. Comb. 59, 60.

If upon a writ of error it be assigned for error, that the plaintiff died before the trial, and issue thereupon taken, the plaintiff in error, by his pleading to the action, is estopped to give in evidence that the plaintiff died before the action brought; but the defendant in error, pleading *quod adhuc in plend vult existit, et hoc*, &c., lets the plaintiff loose from the estoppel.

Comb. 446, ruled by Holt at Guildhall.

||In general a grantor is estopped by his deed to say that he had no interest; but that principal does not apply where the grantor is a trustee for the public: therefore, where a public turnpike-act authorized the trustees to mortgage the tolls, and expressly declared that there should be no priority among the creditors of the trust, and the trustees mortgaged the toll-houses without any authority under the act, in ejectment brought by the mortgagee, it was held that they were not estopped by their deed from showing that the act gave them no such power.

*Fairtitle v. Gilbert*, 2 Term R. 171; and see 2 Bos. & Pul. 219.

Where by articles of agreement, reciting that plaintiffs were the assignees of a patent for a machine, plaintiffs covenanted that defendant might use it in a particular manner during the term of the patent, and defendant in consideration thereof covenanted not to use any other machine; in an action against the defendant, on his covenant for using other machines, the defendant was not estopped from pleading that the invention was not new, and that it was not discovered by the patentee: for though the recital in the deed would probably have estopped him from denying that plaintiffs were in possession of a patent, he could not be estopped from showing that it was void, and therefore that the consideration for his covenant had failed.

*Hayne v. Maltby*, 3 Term R. 438.||

¶In a plea by estoppel, nothing is to be taken by inference; but every fact requisite to create the estoppel must be directly and precisely alleged.

*Crandall v. Gallup*, 12 Conn. 365.g

12. *Pleading with a Profert, and demanding Oyer; And herein,*

1. In what Cases there must be a *Profert* or *Monstrans de Fait*.

Where the plaintiff declares upon a deed, or the defendant pleads a deed, it must regularly be with a *profert in curia*, (c) to the end the adverse party may at his own charge have a copy of it, without which he is not bound to answer. And the (d) reason why deeds must be shown or produced to the

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court is, because it is the proper office of the court to judge of the sufficiency of them, to see that they are duly executed, and without rature or interlineation, and whether they are absolute, conditional, or revocable.

[(c) The general rule was understood to be as here stated, that a deed could not be pleaded without a *profert*. But it hath lately been adjudged, that an instrument may be pleaded as lost by time or accident, or as destroyed by fire, or the like, without *profert*; for *lex non cogit ad impossibilia*, and no human prudence can render deeds of perpetual existence. 3 Term R. 151.] *β* Holt v. Atkinson's executor, 2 Wash. 143. *g* But the excuse of *profert* is traversable, and must therefore be according to the fact; as that the deed is lost or destroyed, or in possession of the other party. 2 H. Bl. 259; and it is necessary to state the parties, although the deed is not producible. 10 East, 55; and the averment of loss, &c., refers to the time of pleading; and therefore, if the deed is found before the trial, it may be given in evidence. 2 Camp. 557. Where a *profert* or excuse are unnecessary they will be considered as surplusage, and will not entitle defendant to *oyer*; but where necessary, if the party make a *profert*, he must produce the deed, or he will be nonsuited, and it will not suffice to show it lost or destroyed. 4 East, 585; 2 Lil. Reg. 210, 382. (d) 6 Co. 36; 10 Co. 93; Hob. 233; Style, 459; 2 Salk. 49 s. pl. 5; 2 Ld. Raym. 1076; Salk. 76, pl. 18; 6 Mod. 244. *β* A *profert* is not requisite on a declaration on a simple contract. Bank of United States v. Sill, 5 Conn. 106; Hinesdale v. Miles, 5 Conn. 381. *g*

A deed, therefore, that is requisite (a) *ex institutione legis* must be shown in court, though it concerns a thing collateral, and conveys or transfers nothing; as, in case of attornment by a corporation which must be by deed, there the deed must be shown: *secus*, where it is *ex provisione hominis*; as, where the condition of a lease is, that the lessee shall not assign but by deed, and not by parol, there he may plead the assignment, without showing the deed; an assignment by parol being sufficient, had it not been provided against by covenant.

6 Co. 38; Bellamy's case, Bulst. 119; Cro. Car. 143. (a) But though a thing will pass without deed, yet, if the party pleads a deed, and makes title thereby, he must come with a *profert*. 2 Mod. 64.

In (b) all cases where a thing cannot be demanded but by deed, the deed must be produced.

Style, 459, *per* Glin, C. J. (b) But in a motion for a prohibition granted on letters patent, the suggestion need not be with a *profert*. 2 Show. 313.

But of things executed, or estates determined, a deed need not be shown; as, a license which is executed, though of its own nature it cannot be without deed.

6 Co. 38; Cro. Ja. 102; 3 Lev. 205.

So if, in trespass against a bailiff, he justifies by virtue of a warrant, without any *profert* thereof, this is sufficient; for the warrant, being executed and returned to the sheriff, is determined: but it is said to be otherwise in a justification for a rent-charge or such things as have continuance.

Cro. Ja. 372, Bateman v. Woodcock; Roll. R. 221, S. C.

So the grantee of the next avoidance to a church, having presented, need not show the deed of grant to him, being a matter executed.

Roll. R. 221, *per* Coke and Dodderidge; and vide Dyer, 29, pl. 194, like point.

So where in replevin the defendant justified by a condemnation before the justices of peace upon the statute of excise, for the non-entry of strong waters, and a warrant made thereupon to levy 20s. set for a fine; and exception was taken thereto, because there was no *profert hic in curia* of the warrant; the court said, the statute does not require that the warrant be under hand and seal, but only in writing, and no writing is to be pleaded unless it

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be a deed: and they held further, that this being executed need not be shown.

3 Lev. 205, Ailsbury v. Harvey.

§ *Profert* of a specialty is not necessary, when it has been pleaded and remains in another court, or in the same court in another action, such former *profert* being averred. (a) And the same rule holds in cases of bonds deposited in the archives of the court, as appeal bonds, supersedeas bonds and the like. (b)

(a) Moore's executors v. Paul, 2 Bibb, 330. (b) Anderson v. Barry, 2 J. J. Marsh. 271.

A *profert* of a deed is not required when it appears to be in the possession of the adverse party.

Barbour's administrators v. Archer, 3 Bibb, 8.

Also a person who comes in by act or operation of law, need not produce the deed, or plead with a *profert in curia*; as, tenant in dower: so, of tenant by statute staple or merchant, who may take advantage of a rent-charge without showing the deed.

Co. Lit. 225; Jenk. 305; Cro. Car. 209; 5 Co. 75.

So if a guardian in chivalry in right of the heir had entered for a condition broken, he might have pleaded the estate to have been on condition, without showing any deed; because his interest was created by law.

Co. Lit. 225 b.

But the lord by escheat, though his estate be created by law, shall not plead a condition to defeat a freehold without showing it; because the deed belongs to him.

Co. Lit. 226 a.

So tenant by the curtesy shall not plead a condition made by his wife, and a re-entry for a condition broken, without showing the deed; for though his estate be created by law, yet the law presumes that he (c) had the possession of the deeds and evidences belonging to his wife.

Co. Lit. 226 a. (c) 10 Co. 94, S. P., and may detain them for his life.

In debt upon an obligation assigned by the commissioners of bankrupts, without showing the obligation; upon which there was a demurrer; it was adjudged to be good enough, because the party came in by act in law, and had no means to obtain it without showing the obligation in court.

Cro. Car. 209, Gray v. Fielder.

[For the same reason, the endorsee of a promissory note endorsed over by an administrator, need not make a *profert* of the letters of administration.

3 Wils. 1; {Willes, 559, Stone v. Rawlinson, S. P.; Barnes, 164, S. C.}

In replevin, the defendant avowed for rent devised to him in mortmain by the custom of London by testament. Fulthorp demanded oyer of the testament. *Per Strange*—It belongs to the executor; as a feme, who demands dower of the rent granted to her baron, shall not show the deed, for it belongs to the heir.

Br. Oy. de Rec. pl. 10.]

Where a man is a stranger (d) to the deed, and doth not claim any thing comprised in the grant, nor any thing out of it, or claim any thing in right of the grantee, as bailiff or servant, there he shall plead the patent or deed, without showing it.

(d) 10 Co. 94, laid down as a maxim. One need not produce a deed in pleading,  
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which is made to a third person, and which he has no means to come by. 2 Show. 418, 3 Lev. 83; Moor, 870; Plow. 149.

Grantee of the next presentation was outlawed, and the church became vacant; the lord of the manor, who was entitled to the goods and chattels of persons outlawed, brought a *quare impedit*; and it was resolved, that the plaintiff being in *in le post*, and not (a) privy to the grant in any wise, need not show the deed of grant to the person outlawed.

Hob. 302, Holland v. Shelley. (a) He who is privy as lessee for years, feoffee, &c., cannot plead a deed without showing it. Bro. *Monstrans*, pl. 61; Co. Lit. 267, 317.

Where a person pleads, that he claims by virtue of a feoffment to uses, or that J S being seised in fee, covenanted with A and B to stand seised to the use of such and such persons, and that the lands came and belong to him by virtue of such covenant, he need not produce the deed; for the deed doth not belong to him, though he claims thereby, but to the covenantees: also, he is in by force of the statute of uses, by operation of law; as tenant in dower, tenant by statute-staple, &c., are.

Cro. Car. 441, Stockman v. Hampton. But for this vide Dyer, 227; Cro. Ja. 917; Jon. 377; Noy, 145, and Carth. 316, S. P. determined for the following reasons. 1st. Because the deed doth not belong to him who is only *cestui que trust*. 2dly. Because he hath no remedy in law to get possession of the deed. 3dly. He is in merely by operation of law, and not in the *per*. ¶ It is settled that *profert* is not necessary of deeds operating under the statute of uses. 1 Saund. 9, n. (1); 3 Term R. 156; 8 Term R. 573; 2 Bos. & Pul. 387.¶

¶ To an action for a breach of covenant for the conveyance of lands, the defendant pleaded the tender of a deed according to the true intent and meaning of the covenant. The plea should have made a *profert* of the deed, because the court is to decide upon the proper construction and legal operation of the deed.

Sook v. Knowles, 1 Bibb, 283.g

In debt against an executrix for 10*l*. the plaintiff declared upon an obligation, conditioned to pay 5*l*. to A to the use of M his daughter, at a time limited in a certain indenture; the defendant pleads, that the indenture was made between her testator and one J S, by which the plaintiff enfeoffed J S, to the use of the testator and his heirs, and that the testator covenanted to pay 5*l*. to the plaintiff within two months after the death of W R, which W R is yet alive; the plaintiff demurred, because the defendant did not produce the indenture: but the court held, that the plea was good without it, because the defendant was a stranger to the deed; and it does not belong to her, but belongs to the feoffees, and she has no means to enforce them to produce it, and the court will not impose an impossibility: that she was still more entitled to favour, being an executrix.

Lutw. 481, Crotch v. Crotch.

Where a man justifies under a deed only as servant, and claims no title himself, nor hath any interest therein, but the title and interest is his master's; yet he ought to show the deed, for it is the substance of the title, and without showing it he cannot justify.

Cro. Ja. 292; 2 Lil. Reg. 202.

So where the defendant justified as a servant to the queen's patentee for years, and by his command, but did not bring into court the patent, the plea was held naught; for that he deriving his title from the patentee, not by act in law, but by his command, he ought to show the patent, as well as he who claims under the patent by assignment; but he who claims interest under



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an act in law (because he had no means to compel the patentee to show it) may justify without showing it.

Cro. Ja. 317; and vide *Style*, 15.

So where a servant justifies for tithes by lease, yet, coming in by title and privity, he ought to show it as well as his master; and he cannot plead the entry into another's soil without making a good title there, which ought to be by showing the lease.

Cro. Ja. 360; 2 *Lil. Reg.* 202.

In an assize the tenant pleads a feoffment of the ancestor of the plaintiff unto him, &c., and the plaintiff saith the feoffment was on condition, &c., and that the condition was broken, and pleads a re-entry, and that the tenant entered and (a) took away the chest, in which the deed was, and yet detains the same; he shall not in this case be enforced to show the deed.

Co. Lit. 226 a. (a) If the party who would plead the deed has it not, he ought to move the court, and the court will order him the deed, or a copy of it. Sid. 50. [As to cases where the courts will order one party to produce deeds or writings at the instance of the other, vide *Tidd's Prac.* (7th ed.) 609, 610.]

In debt upon a bond, conditioned for the performance of the covenants in an indenture, the (b) defendant ought to show the indenture; and the entry always supposes it to be brought into court by him, though the court will sometimes (c) compel the plaintiff to give a copy thereof to the defendant, if he swears he never had a part thereof, or hath lost it; but this is done *ex gratiâ curiæ*, and not *ex debito justitiæ*. But where in such action, after oyer of the bond and condition, it was entered upon the roll, that the defendant prays oyer of the indenture, *et ei legitur*, This indenture, &c., and the defendant pleaded, &c., it was adjudged upon a general demurrer, that this manner of pleading was good in substance, though not formal; for it shall be intended the true indenture, and that it was in court, though by the record it did not appear to be so. But *per curiam*.—If it had been on a special demurrer, it had been naught.

Sand. 8, 9, *Jevons v. Harridge*. (b) He cannot plead performance without showing it. Allen, 72; Vent. 37; Mod. 266. (c) That if it be lost, the court will compel the party to show his counterpart, and he to plead thereto, otherwise they will grant an imparlance. Cro. Ja. 426; Sid. 386; 2 Keb. 430. β No profert need be made when the bond is declared on as lost. *Respublica v. Coates*, 1 Yeates, 2.g

When one is bound by bond to perform covenants in an indenture, in an action upon the bond, the defendant, in order to discharge himself, ought to show the deed to the court, that they may see what the covenants are; for he cannot show that he has performed all, without showing what he was to perform; and therefore he ought to recite the indenture, whereof he is supposed to have a counterpart in his plea; but if he never had a counterpart, or had lost it, upon oath thereof the court will compel the plaintiff to give him a counterpart, in order to set it out for his defence.

6 Mod. 237, *per curiam*.

But, where an action was brought upon a special agreement contained in a note, and a rule was made to show cause why the plaintiff should not give the defendant a copy; upon cause shown the rule was discharged; because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy.(d)

Salk. 215, pl. 3, *Hill v. Aland*. (d) But perhaps if there was good reason to suspect a forgery, the court might make a rule compelling plaintiff or his attorney to leave i

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with the master for inspection, or to produce it to defendant and his witnesses, that they might inspect it. || In *Chetwind v. Marnell*, 1 Bos. & P. 372, the court refused to order the plaintiff to produce a bond suspected to be forged, for inspection by an officer of the stamp duties, as it might be compelling him to produce the means of convicting himself of a capital felony. ||

[If a man who ought to show a deed, do not show it, but only a confirmation, it is not good. *Quod nota bene*.

Bro. *Monstr.* pl. 134.]

Where a deed is only inducement to the action, it need not be pleaded with a *profert*.

2 Bulst. 228; Style, 193, 264; Cro. Eliz. 217; Jon. 377; Cro. Ja. 43, 70; Cro. Car. 442; Roll. R. 13, 328; || 8 Term, R. 573; || 8 Term, 571, *Banfill v. Leigh*. But whenever the action is founded on a deed, the deed must be declared upon, and a *profert* made. As if a contract of freight and demurrage be entered into by deed, the plaintiff cannot declare in debt generally and give the deed in evidence, but ought to declare on the deed and make *profert* of it. The only case excepted from the general rule is that of debt for rent; in which the deed need not be declared upon. 4 Bos. & Pul. 104, *Atty v. Parish*.}

As, where a lessee for years claimed a way to his house by a *que estate*, without showing the deed; this was held sufficient by three justices against one, because the lessee has not the deed; and it is but a conveyance to the action, which is grounded on the disturbance done to him in his possession: but, if he had claimed a rent or common in gross, which could not pass without deed, it had been otherwise; for there he could not show *que estate*, without showing the deed, how he came by the estate.

*Palm*. 387; Cro. Ja. 673; *Slackman v. West*, 3 Mod. 52, S. C. cited; and for which vide *Yelv.* 201; *Brown*. 220; Cro. Ja. 171; 2 Mod. 277.

[If a plaintiff describe himself as administrator, where he has no occasion to do so, a *profert* of the letters of administration is unnecessary.

*Dougl.* 5, n.]

|| And if plaintiff sue on a note endorsed to him by an administrator, he need not make *profert* of the letters of administration, for he is not entitled to the custody of them; but they must be proved at the trial.

*Willes*, 560. || A general *profert* of letters testamentary by an executor is sufficient; if the defendant would object to their sufficiency he must crave over: or if he allege that the plaintiff is not an executor he must plead in abatement. *Childress v. Emory*, 8 Wheat. 642. g

It was formerly, and before the statute 16 & 17 Car. 2, c. 8, held, that the not pleading a deed with the *profert* was matter of substance, and that such omission made the judgment (a) erroneous.

Vide Cro. Ja. 32; Cro. Eliz. 217; *Hob.* 301; *Moor*, 885; Cro. Car. 190. (a) Where the want of a *profert* was made good or dispensed with by the plea of the adverse party. *Hutt.* 54.

But now by the 8th chapter of the said statute it is enacted, "That after verdict judgment shall not be stayed or reversed for default of alleging the bringing into court any bond, bill, or other deed mentioned in the pleadings, or of any letters testamentary, or of administration." Since this statute it hath been (b) held only matter of form.

(b) For which vide *Sid.* 249; *Salk.* 497; *Lutw.* 1353; 6 Mod. 135.

And by the 4 & 5 Ann. c. 16, "No advantage or exceptions shall be taken for want of a *profert in cur.*, &c., but the court shall give judgment according to the very right of the cause, without regarding any such omission and defect, except the same be specially and particularly set down and shown for cause of demurrer."

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In a *scire facias* by an executor, the clause of *profert hic in curia literas testamentarias* may be inserted in the middle as well as in the conclusion of the writ.

Carth. 69, *Bosworth v. Ridgley*.

[Where the probate of a will is lost, a *profert* may be made of an exemplification of it.

*Shepherd v. Shorthouse*, 1 Stra. 412.]

|| Regularly where a man pleads letters patent to himself, or another to whom he is privy, or under whom he justifies, he ought to show them to the court.

10 Rep. 88, 92; *Moor*, 849; *Dy*. 29 b.

But by the operation of the 3 & 4 Edw. 6, c. 4, explained by 13 Eliz. c. 6, an exemplification only of the letters patent need be brought into court, and not the letters patent themselves.

*Roberts v. Arthur*, 2 Salk. 497.

By 10 Ann. c. 18, § 3, where an indenture of bargain and sale is pleaded with a *profert in curia*, the party may show forth a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer, and proved on oath to be a true copy, shall be of the same effect as the original. ||

β Sealed instruments in the power of the party pleading must be pleaded with a *profert*.

*Bender v. Sampson*, 11 Mass. 42; *Gwathney v. Stump*, 2 Tenn. 308; *Degraffinread v. Mays*, 6 Yerg. 465.g

2. Of demanding *Oyer*.

*Oyer* (a) of a deed or record is always to be had by him who is to be charged by it, and not by him who pleads it; and he who pleads or declares upon it must show it. (b)

Bro. *Oyer de Faits*, 15. β *Oyer* is not demandable of a record, nor in an action upon a bond for performance of covenants in another deed can *oyer* of such deed be craved. *Sneed v. Wiester*, 8 Wheat. 690. But see *Kendal v. Talbot*, 1 Marsh. 322; where it is said that *oyer* of a record pleaded, which is of the same court, is demandable of right; *secus*, when the record is of another court. See *Slayton v. Chester*, 4 Mass. 478; *Guild v. Richardson*, 6 Pick. 364; *Commonwealth v. Roby*, 12 Pick. 496; *Nichol v. White's administrator*, 4 Hayw. 257; *Searcy v. Whitesides*, 5 Hayw. 120.g (a) To demand *oyer* of an obligation, is not only for the defendant's attorney to desire the plaintiff's attorney to read the obligation to him, as the word seems to import, or to have a sight of it, but that he may have a copy of it, that his client may consider by it what to plead to the action. 2 Lil. Reg. 226. {The party praying *oyer* is entitled to a copy of the attestation and of the names of the witnesses, as well as of every other part of the deed. *Willea*, 288; *Longmore v. Roger*, Barnes, 263, S. C.} [And the party of whom *oyer* is demanded is bound to carry it to the adverse party. 2 Term R. 40.] — (b) But the defendant may, if he pleases, plead without demanding *oyer* of it; and if he once plead, he cannot after waive his plea and demand *oyer*. 2 Lil. Reg. 226. — Where there ought to be *oyer*, the party, if he has demanded it, is not bound to plead without it. 6 Mod. 28; [2 Stra. 1186; 1 Wils. 16. Where a deed is in the hands of a third person, the court will oblige him to give *oyer*, and produce it. 2 Stra. 1198.]

If a man (c) enters into an obligation by a wrong name, no advantage can be taken thereof, without demanding *oyer* of the deed.

6 Mod. 303. (c) If the defendant would take advantage of a wrong original, he must demand *oyer* of it. 4 Mod. 246. [But it is now settled, that if the defendant demand *oyer* of the original writ, the plaintiff is not bound to attend to it, but may proceed as if no such demand had been made. *Boats v. Edwards*, Dougl. 227; *Ford v. Burnham*, Barnes, 340;] || 3 Bos. & Pul. 398; 7 East, 383. ||

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Articles of agreement indented were pleaded, and replication was, that in the said articles it is further covenanted, without demanding oyer of the deed; and the court held it ill pleading, and gave judgment *nisi*.

Keb. 513. For according to Hutt. 33; they cannot plead and show the counterpart; [and see 1 Stra. 227. What is said in the text must be understood as confined to cases in which the party pleading a deed is bound to make *profert* of it.]

In trespass the defendant justifies for common, and sets forth letters patent of the king *hic in curiâ prolat.*; which plea the plaintiff accepts, without demanding oyer of the letters patent, but after he demanded oyer of them; but denied *per curiam*; and the prothonotaries said that he is not obliged to show them, if not required at the acceptance of the plea.

Pasch. 26 Car. 2, in C. B., Mathews v. Alderton. [A party is not obliged to give oyer of letters patent. 1 Term R. 149.] [See 1 Will. Saund. 189, note 2; nor of a private act of parliament, Doug. 476.]

Oyer of the deed cannot be demanded but during the time it is in court, and that is all the term wherein it is produced, and then it may be entered *in hæc verba*; and there may be a demurrer or issue upon it; but it cannot be done of another term, because the deed is then out of the court.(a)

5 Co. 76; Lutw. 1644; 2 Lil. Reg. 267; [1 Term R. 149.] [(a) That is, if it be not denied; for, in that case, the law doth adjudge it to be in the custody of the party to whom it belongs; but if it be denied, then it shall remain in court until the plea is determined; and if it eventually turn out not to be the plaintiff's deed, it shall be destroyed. See the above authorities, and Co. Lit. 231 b. But letters testamentary, or of administration, are not supposed to remain in court all the term; for the plaintiff may have occasion to produce them elsewhere. 2 Salk. 497; 12 Mod. 590, S. C.]

If the defendant pleads a former action depending in the same court in abatement, and the plaintiff craves oyer of the record, if it is not given in convenient time, viz., the next day, the plaintiff may sign judgment.

Carth. 453; Ld. Raym. 347, Theobald v. Long; and Carth. 517, S. C., where this is said to be the quickest method of proceeding.

[If the defendant plead a judgment or other matter of record in the *same* court, he must give a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; or in default thereof the plea is not to be received. But in strictness oyer is not demandable of a record; and, it seems, not of an act of parliament.

Keilw. 96; Carth. 454; 1 Ld. Raym. 347, 550; 2 Stra. 823; R. T. 5 & 6 G. 2, B. R.; Dougl. 476; 1 Term R. 149.

The time allowed for the defendant to give oyer of a deed, &c., to the plaintiff is two days, exclusive after it is demanded. If it be not given in that time, the plaintiff may sign judgment as for want of a plea.(b) If given, the plaintiff shall have the same time to reply after it is given, as he had at the time it was demanded.(c)

Carth. 454; 2 Term R. 40. (b) 6 Mod. 122. (c) R. T. 5 & 6 G. 2, B. R.] [Tidd's Prac. 588, (9th ed.)]

If in debt on a bond for performance of an award the defendant pleads no award, and the plaintiff sets forth an award, with a *profert hic in curiâ*, and the defendant craves oyer, and then demurs for variance between the award set out in the replication and the oyer, and the variance appears material, the defendant must have judgment; otherwise if the variance had been as to those parts in which the award was void. And though in debt on an award the plaintiff need not set forth more than makes for him, yet it is otherwise in debt on a bond; for there the plaintiff must reply the whole

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award; and if such replication be without a *profert* the defendant may reply *nul tiel agard*.

Salk. 72, pl. 9; Ld. Raym. 715, *Foreland v. Marygold*, adjudged; and vide *Style*, 459. See 12 Mod. 534.

{A variance between the declaration and the bond of which oyer is given is matter of {<sup>1</sup>} demurrer, but not of error.

2 Bin. 76, *Dougllass v. Beam*. {<sup>1</sup>} 3 Cran. 229, *Cooke v. Graham's Admr.*}

After imparlance oyer cannot be demanded, because the imparlance is to another term: but if it be by bill in B. R.(a) it may, though not in the Common Pleas.

Lil. Reg. 267; 6 Mod. 27, 233; 2 Show. 310, pl. 331. [(a) This must be understood of a *special* imparlance to another day in the same term.] [Tidd, 587, (9th ed.)]

β In an action on an agreement, the plea of covenants performed dispenses with oyer.

*Little v. Henderson*, 2 Yeates, 74.g

When oyer of a deed is prayed, it is intended that the deed is in court, and the *ei legitur*, or reading of it,(b) is the act of the court.

Sid. 308. (b) 2 Lutw. 1644, *contra*. β On covenant, when the agreement which is the foundation of the action is recorded in the office for recording deeds, and oyer is asked by the defendant, when the original agreement is lost, a copy from the record will be received as good oyer. *Dunbar v. Jumper*, 2 Yeates, 74.g

When a deed is pleaded with a *profert hic in curiā*, the very deed itself is by intendment of law immediately in the possession of the court; and therefore when oyer is craved, it is of the court, and not of the party; and (c) after oyer is craved the deed becomes parcel of the record, and the court must judge upon the whole;(d) and the demand of oyer is a kind of plea,(e) and may be counterpleaded.

3 Salk. 119, pl. 2. β The *profert* has been made of a deed, yet if oyer be not prayed, the deed is not a part of the record. *Bender v. Fromberger*, 4 Dallas, 436.g (c) When upon oyer of the deed it is entered, the whole case appears to the court as fully as if the deed had been in the plea. Hob. 217; Show. Parl. Ca. 221. [(d) And this, though it were not strictly demandable at the time of granting it. Dougl. 460. (e) As it is a kind of plea, it should regularly be made before the time for pleading is expired. *Fowler v. Dyer*, Mich. 20 G. 3; Tidd's Pr. 347.]

If the defendant prays oyer of the bond and condition, and it is entered *in hæc verba*, the condition becomes parcel of the plaintiff's declaration, and it is not part of the defendant's plea.

Carth. 513. [See 4 Barn. & C. 741.]

||The bond and condition are considered distinct, the bond being complete without the condition; therefore there may be oyer of the one without the other.

1 Will. Saund. 289, 290.

And praying oyer of one does not entitle the party to oyer of the other, but it must be demanded of both, if wanted.

*Cook v. Remington*, 6 Mod. 237.

And in this respect the condition or endorsement of a bond differs from a condition or endorsement on a deed: for the endorsement on a deed made at the time of its being executed is part of the deed, and, therefore, there can be no complete oyer of the deed without the endorsement.

6 Mod. 237.||

Debt for the duty of scavage, and declares upon a patent of Edward IV., defendant imparls, and after demands oyer of the letters patent; upon which

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the plaintiff demurs. *Per cur.*—The demurrer is ill; for the defendant having demanded oyer, &c., he ought either to have it, or to be ousted of it by the rule of court; but there cannot be a demurrer upon the demand; he ought to have counterpleaded the demand of the oyer, and the judgment of the court would have been, that he should answer *sine auditu*, &c., and it was resembled to an *aid prier*, in which the plaintiff cannot demur, but must counterplead. (a)

*Trin. 27 Car. in B. R., Mayor and Commonalty of London v. Goree, 2 Lev. 142; 3 Keb. 491, S. C.* [(a) It seems, however, that the plaintiff, if he would contest the oyer, may either counterplead it, or strike out the rest of the pleading and demur; on which the judgment of the court is, either that the defendant have oyer, or that he answer without it. On the latter judgment the defendant may have a writ of error; for to deny oyer where it ought to be granted is error, but not *e converso*. 2 Salk. 497; 2 Ld. Raym. 970; 2 Stra. 1186; 1 Wils. 16.]

[It hath been said, that the defendant is not bound to set forth the oyer in his plea; and that if he do not, the plaintiff may pray an enrolment, and so make it part of his replication. But it is now holden, that if the defendant, after praying oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea, or the court will quash it, for that by craving oyer the defendant undertakes to set out the whole *verbatim*; and if he do not so the plea is bad.]

*Weavers' Company v. Forrest, 2 Stra. 1241; Simmonds v. Parminter, 1 Wils. 97; Wallace v. Duchess of Cumberland, 4 Term R. 370; Slater v. Horne, E. 34 G. 3, B. R.; Tidd's Prac. 309, S. P.* See also *Barnes, 327, S. P.* [The party praying oyer is entitled to a copy of the attestation, and the names of the witnesses. *Willes, 288.*]

[[If any part of the deed in the declaration be omitted, which the defendant conceives would, if shown, induce the court to construe the deed in his favour in point of law, and decide against the plaintiff, the proper mode is for the defendant to pray oyer of the deed, and after setting it out *in hæc verba* to demur: by so doing the defendant is enabled to compare one part of the deed with the other, and from the whole context to explain and show the intention of the parties, or the legal effect of the deed.]

See 2 Will. Saund. 367, note 1.

Thus, where, (among many other instances that might be given,) in covenant by vendee against vendor, who had covenanted that he had a good right to convey, the declaration stated an eviction of the plaintiff by a stranger, and it appeared by the partial statement of the deed in the declaration that the vendor had covenanted against the acts of strangers, and the court would have been of that opinion if the defendant had pleaded some collateral matter, and afterwards moved in arrest of judgment; but as, from comparing the whole deed together, it was clear that the vendor had only meant to covenant against the acts of *himself and his heirs*, therefore, to enable the court to construe the covenant according to such intention of the party, the defendant set forth the whole deed on oyer, thereby making it part of the declaration, and then demurred, and so took the opinion of the court on the construction of the covenant.

*Browning v. Wright, 2 Bos. & Pul. 13.*

Where plaintiff declares on a deed, and defendant craves oyer of the deed, sets it out, and pleads *non est factum*, the deed becomes a part of the declaration; and the only question at the trial is, whether the deed set out was executed by the defendant.

*Snell v. Snell, 4 Barn. & C. 741; and see 5 Taunt. 707.*

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If the defendant set out the deed on oyer, and then demur, he cannot take advantage of a variance in an *immaterial* part between the deed stated in the declaration and that set out on oyer, even though the variance might be such as would be available on *non est factum*.

Ross v. Parker, 1 Barn. & C. 358.¶

[Where the defendant in an action on a bond, after craving oyer, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served the defendant's attorney with a rule to abide, &c., and gave notice of trial; and afterwards the defendant returned the paper book, setting out a false oyer of the bond, and pleading as before, on which the plaintiff enrolled the true condition, and demurred; the court ordered all the proceedings to be struck out, that the plaintiff should have judgment, and the defendant's attorney should pay all the costs.

Ferguson v. Mackreth, Hil. 24 G. 3, B. R., cited in 4 Term R. 371, note.] [See further, as to oyer, 1 Chitt. on Plead. 369; Stephen on Plead. 86.]

§ A misrecital of a writ as "summoned," instead of "attached," is not error; and oyer of the writ for the purpose of showing the variance will not be granted.

3 Har. R. 105, 124.

Where the defendant demands oyer of letters testamentary, and the contents of the will are not in question, it is sufficient to give a copy of the letters testamentary, certified by the register, without annexing a copy of the will.

Back v. Pears, Coxe, 288.

Where oyer is demanded, and the manner in which it is given is unsatisfactory, the objection must be made at the trial, and not by motion to produce the papers that are wanted.

Brooks v. Brooks, 1 Halst. 404.

In an action of debt on bond the defendant craves oyer, and the plaintiff sets out a bond which recites that "E B D is cashier," he is estopped from denying that E B D is cashier; he cannot admit a deed and at the same time traverse the truth of its contents.

State Bank v. Chetwood, 3 Halst. 1.¶

13. *Pleading a Recovery in a former Action.*

It is a maxim in law, *quod nemo bis vexari debet si constat curiæ quod sit pro una et eadem causâ*; so that regularly a bar in a real or personal action by judgment, confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or like nature.

6 Co. 7; Hob. 4, 5; Vent. 170. § Former recovery may be pleaded at any time before verdict. Lacroix v. Macquart, 1 Miles, 42.¶ {The judgment or decree of a court possessing competent jurisdiction is final not only as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. The only exceptions to this general rule are, 1. The case of mutual dealings between the parties, where the defendant omits to set off his counter demand, and may still recover it in a cross action; and 2. The case of an ejectment, in which the defendant, neglecting to bring forward his title, is not precluded by the recovery against him from availing himself of it in a new suit. 1 Johns. Ca. 492, 502, 510, Le Guen v. Gouverneur & Kemble.—The court will not interfere summarily to set aside the proceedings in the second suit, but will put the defendant to his plea. 2 Bos. & Pul. 69, Martin v. Kennedy.}

But herein there is a diversity between real and personal actions; for  
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though in the latter, as debt, account, &c., the bar is perpetual; yet in real actions there is this distinction, that a bar in one real action is not a bar to an action of a higher nature; (a) and therefore if a man is barred in an assize of *novel disseisin* he may have a *monstrans de droit, assise de mort d'ancestor, ayel, besail, entry sur disseisin a son ancestor*; and this is said to be in favour of inheritances.

6 Co. 7; and vide tit. *Ejectment*. [(a) It was observed by Lord Ellenborough, in giving judgment in *Outram v. Morewood*, 3 East, 357, that "what Lord Coke says, that in personal actions concerning debts, goods, and effects, (by way of distinction from other actions,) a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever, *quoad their subject-matters*; and the general rule is, that an allegation or record, upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found." Ibid.]

So if a man is barred in a *formedon in descender*, he may bring a *formedon in remainder or reverter*.

5 Co. 33 a; 2 Mod. 43.

If a man is barred in an action of trespass for the taking of goods, this cannot be pleaded in an appeal of robbery, being of a higher nature.

Bro. *Estoppel*, 217; 4 Co. 43.

Where A robbed B of 3000*l.* of money in bags, for which he was afterwards indicted and convicted, and afterwards B brought trespass against A for taking the said moneys, who pleaded the indictment, by the *procurement* of the plaintiff, and the conviction in bar, but did not show that the plaintiff had given evidence for the conviction; for this reason the bar was held insufficient; for otherwise he shall not have restitution, and the allegation of *procurement* is not sufficient; *et ea de causâ* judgment was given for the plaintiff, and not for the matter in law, for that was against him.

Noy, 82; Lane, 144, *Markham v. Cobb*.

If a man grants a rent to another, payable at a certain day, and covenants to pay the rent accordingly, if the grantee afterwards recovers in an action of covenant for the non-payment of the rent, (b) this will be a bar for an action after for the rent; (c) for in the action of (d) covenant he shall recover all the rent in damages.

Roll. Abr. 353, *Strong v. Watts*. (b) So, a recovery or bar in an *assumpsit* will be a good bar in debt for the same thing. 4 Co. 94; Yelv. 84; Cro. Ja. 110; Cro. Eliz. 240. (c) But in *assumpsit* the defendant cannot plead an account brought for the same money to which he had rendered his law; because damages are recovered in *assumpsit*, but not in an account. Moor, 458. But *quære*; and vide Cro. Ja. 110. (d) So where an action is brought upon a special *assumpsit* to pay. Cro. Car. 415; Cro. Eliz. 57.

If A and the other executors of B bring debt upon a bond, and the defendant pleads, that before the purchase of this writ, the said A as administrator to B, brought debt upon the same bond against the defendant, who then pleaded that B made executors, who administered, &c., and the plaintiff then replied, that administration was committed to him *pendente lite* between the executors; upon which the defendant then demurred; and it was adjudged for him; and so now pleads this matter by way of estoppel, and demands judgment if, as executor, he shall have an action upon the same bond against the same defendant: this is no good plea; for by the first judgment the plaintiff was only barred as to the action of the writ, viz.: to have one as administrator; but this mistake of his action is no bar or estoppel to bring his true action.

5 Co. 32, 33, *Robinson's case*; Cro. Ja. 15, S. C.; by the report of which it appears



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that he did not know that he was executor; and there said, that the rule in personal actions, once barred and always barred, must be intended where it is a bar to the right, not where the action is only misconceived.—And so in 6 Co. 8, where the S. C. is cited, and 2 Mod. 319.—So where judgment is given upon the manner, not the matter of the plea. 2 Lev. 210.—If a man brings trespass for taking his horse, and is barred in that action, yet if he can get the horse into his possession, the defendant is without remedy; for notwithstanding the recovery the property is still in the plaintiff. 2 Mod. 319, *per cur.*

If in trover for plate the defendant pleads that the plaintiff had before brought his action for the same plate against J S, and had judgment to recover 20*l.* damages, and (a) had J S in execution for the same, and avers it to be the same conversion, &c., this is a good plea; for by the judgment the damages which were before uncertain are reduced to a certainty, and therefore he shall not demand the uncertainty again; and by the judgment the property of the goods is altered.

Cro. Ja. 73, *Brown v. Wotton*; *Yelv.* 67; *Moor*, 762, S. C. (a) So, though he had him not in execution; for by the judgment *transit in rem judicatum*. *Yelv.* 68.—And where and how the defendant may enforce the plaintiff to enter up his judgment, to the end he may plead it to another action, vide *Latch*, 216.

But a judgment in debt against one obligor, upon a joint and several obligation, and the body taken in execution, is no plea to an action brought against the other obligor.

Cro. Ja. 73; for this vide tit. *Obligation*.

If a man hath judgment in C. B., upon an obligation, he shall not afterwards bring an action of debt upon the same obligation, as long as the said judgment remains in force; for by this judgment the specialty is turned into a matter of record.

6 Co. 44, *Higgin's case*.

Otherwise, if in the county court by *justices*, for that court not being of record, he may, upon the same obligation, have debt in a court of record.

6 Co. 45 a. Where a judgment in a foreign attachment shall be pleaded in bar to other actions, vide *Roll. Abr.* 555, and tit. *Custom of London*. {1 *Salk.* 280, *Brook v. Smith*. The pendency of a foreign attachment, even in another state, before suit brought, may be pleaded in abatement. 1 *Salk.* 280; 5 *Johns. Rep.* 101, *Embree v. Hanna*.}

[Neither can the pendency of an action in an inferior court be pleaded to an action brought in one of the courts at Westminster for the same thing.

*Sparry's case*, 5 Co. 62; *Dudfield v. Warden*, *Fitzg.* 313. Vide *etiam suprad.*] β The pendency of a suit in another state or in a foreign court by the same plaintiff against the same defendant, for the same cause of action, is no stay or bar for a new suit brought in New York. *Browne v. Joy*, 9 *Johns.* 221.γ

If in debt on a bond the defendant pleads, that the plaintiff brought an action in London upon the same bond, to which the defendant there pleaded *non est factum*, and it was found for him; upon which it was entered, that the defendant should recover damages against the plaintiff, *et quod eat inde sine die*, this is no plea, because the judgment was not *quod querens nil capiat per breve*, and so no judgment was given so as to bar the plaintiff in another suit.

Cro. Ja. 284; *Brownl.* 81, *Level v. Hall*. {Vide 2 *Mass. T. Rep.* 338, 357, *Kent v. Kent*.}

If in debt against executors they plead a judgment obtained against one of them as administrator, this is a good bar; for though he might have

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pleaded in abatement to the first action, yet he was not obliged so to do, and this recovery against him was upon the right of the debt.

Lev. 261, *Parker v. Amys*.

If in action upon the case the declaration is insufficient, and the defendant pleads an ill plea, but judgment is given against the plaintiff upon the insufficiency of declaration, but by mistake entered *quia placit prædict. &c., bonum et sufficiens in lege existit, &c., ideo consideratum, &c., quod querens nil capiat per billam*,<sup>(a)</sup> whereas it ought to have been entered *quod defendens eat inde sine die*, and the plaintiff brings a new action, and declares a right, and the defendant pleads the former judgment, reciting the record *verbatim*, this is no good plea; for, without question, the plaintiff having only committed a mistake in his declaration, he may set it right in a second action.

Mod. 20, *Leppin v. Kedgwin*. (a) Where judgment is given for the tenant or defendant upon a plea in bar, or to the writ, &c., the judgment is all one, viz.: *quod eat inde sine die*, and shall have reference to the nature or matter of the plea, and so be taken to go in bar, or to the writ. Co. Lit. 363; 8 Co. 68.

But if a declaration be faulty and the defendant take no advantage thereof, but plead a plea in bar, upon which the plaintiff take issue, and the right of the matter be found for the defendant, the plaintiff shall have no other action, for he is estopped by the verdict. So if a declaration be faulty and the plaintiff demur to the plea in bar, by which he confesses the fact, if well pleaded, he is estopped thereby, and shall have no other action. But if the plea is not good it can be no estoppel, but the plaintiff may have another action.

Mod. 207; *per cur.* Skin. 120, pl. 15, S. P. In some cases where the merits are really with the plaintiff, and he hastily demurs to a good plea, conceiving it to be bad, the court will, before judgment, give him leave to withdraw his demurrer, on payment of costs, and take issue on the plea.

If in trover for certain sheep the plaintiff declares that the 25th day of March, in the year, &c., he was possessed thereof, and lost them, and that the same the last day of April in the same year came to the hands of the defendant, who the same day converted, &c., and the defendant pleads, that the plaintiff had before brought trespass against the defendant, and J S, *quare ceperunt et abduxerunt* the said sheep, and thereupon counted of a taking the 14th of April in the same year, to which the defendants then pleaded a judgment against J N, who was possessed of the said sheep, and that by virtue of a *fieri facias* thereupon the said sheep were sold to the defendant, &c.; whereupon issue being joined it was found for the plaintiff, and 2*d.* damages given, upon which the plaintiff had judgment for the said 2*d.* damages, and 6*l.* costs, and avers the taking and driving, for which the said recovery in trespass was had, and the conversion in this action to be all one, &c.; and to this plea the plaintiff replies and confesses the said action, and recovery of the 2*d.* damages, &c., but says the said 2*d.* damage was not given for the value or conversion of the said sheep, *absque hoc*, that the said taking and driving, whereupon the said judgment was had, is the same trespass *quoad* the conversion of the said sheep of which the plaintiff now declares; this is a good replication, and the plaintiff shall recover: for the damage being so small, cannot be presumed to be given for the value of the said sheep; for if so, the plaintiff must, for 2*d.* only, lose his property in the said sheep; therefore it shall be presumed, and may be averred, that this damage was given for the chasing and driving, and that the plaintiff had the

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sheep again, and after lost them, &c., and the rather because in time the conversion is supposed so long after the chasing and driving.

Cro.-Car. 35, Laicon v. Bernard; Hutton, 81, S. C. adjudged by three judges against Yelverton.

If in an action upon the case the plaintiff declares against the defendant, that he falsely and maliciously did procure a commission of bankrupt to issue out against the plaintiff, &c., by virtue whereof the defendant broke his shop, and took away his goods and shop-books, whereby he was discredited and lost his trade, to his damage, &c.; and the defendant pleads, that the plaintiff had brought an action of trespass for breaking his shop, taking his goods, &c., and upon that action had recovered damages, &c.; this is no good plea, for this action is not brought for the same thing as the former was, in which no damages could be recovered for the scandal, upon which this action is grounded.

Style, 3, 4, 201, Watson v. Norbury.

If in trover for certain goods the defendant pleads, that the plaintiff had brought trespass *vi et armis* for the same goods, and upon not guilty pleaded, a verdict and judgment was thereupon given for the defendant, &c.; this is no good plea, because this action will in many cases lie where trespass will not; and so it may be very well presumed, that the plaintiff at first only mistook his action, and brought trespass where his evidence would serve in trover only.

Raym. 47; 3 Mod. 1, 2; 2 Mod. 318, Put v. Rawstern.

But it hath been since held, that if in trover for certain goods the defendant pleads, that the plaintiff had before brought an action of trespass *quare vi et armis ceperunt et asportaverunt* against the same defendants for the same goods, to which the defendants then pleaded not guilty; and upon a special verdict, which the defendants in their plea set forth *verbatim*, the court then gave judgment, that the plaintiff *nil capiat per billam*, and that the defendants *irent inde sine die*, and avers the goods in both declarations to be the same; and the taking and carrying away, &c., supposed in the said action of trespass, and the coming to the hands of the defendant, &c., in this declaration, to be the same, and the cause of action the same, &c.; this is a good plea; for though trover will lie in many cases where trespass will not, yet upon the matter here disclosed in pleading it appears the plaintiff was before barred, not by mistake of his action, but upon the rights and merits of the cause.

2 Vent. 169, Letchmere v. Toplady; 1 Show. 146, S. C.

[So, to an action of *indebitatus assumpsit* for the value of goods, a judgment for the defendant in trover for the same goods may be pleaded in bar, provided it appear, by proper averments in the plea, that the question between the parties was the same in both actions. So, *e converso*, (a) a recovery in *indebitatus assumpsit* for the value of the goods may be pleaded in bar to an action of trover for the same goods. In these cases the principal consideration is whether it be precisely the same cause of action in both, which may appear either by proper averments in a plea, or by proper facts stated in a special verdict or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions.

Kitchen v. Campbell, 2 Black. R. 827; 3 Wils. 304, S. C. (a) 2 Ld. Raym. 1216. That a former recovery may be given in evidence on the general issue to an action on the case. 2 Stra. 733; 3 Burr. 1353; 1 Show. 146. *Secus*, to debt, *qui tam*, 1 Stra. 701, 702, or on bond.] [And in trespass a former recovery must be pleaded. 3 Burr.

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1353; but in *assumpsit* it may be given in evidence. 2 Stra. 733. A verdict for defendant in a former action, which if pleaded in bar would be an estoppel, when given in evidence under the general issue is not conclusive against the plaintiff, but only evidence to go to the jury. 2 Barn. & A. 662.]

{A judgment upon a *formedon in the descender* for the tenant is a good bar to a writ of *entry sur disseisin* for the same lands brought by the same demandant against the son and heir of the tenant in the first action; both actions being brought for the same thing, and to be supported by the same evidence.

2 Mass. T. Rep. 338, *Kent v. Kent*.

If a promissory note of a third person be endorsed by the purchaser of goods to the vendor, as a conditional payment for the goods, a judgment in favour of the purchaser in a suit against him as endorser of the note cannot be pleaded in bar of another suit brought against him for the goods sold; for the suits are for different and distinct causes of action, and the decision of them depends on different questions.

1 Cran. 181, *Clark v. Young*.

A judgment in *assumpsit* upon a policy of insurance is a bar to a subsequent action of covenant on the same policy.

Cran. 332, 340, *Marine Ins. Co. of Alexandria v. Young*.}

||Where the plaintiff in a former action declared on a promissory note, and for goods sold, &c., and on executing a writ of inquiry gave no evidence as to the goods, and took his damages only on the note, it was held that this was no bar to his afterwards suing for the goods sold, &c.

*Seddon v. Tutop*, 6 Term R. 607.

So, where a rector sued the executor of his predecessor for dilapidations in the chancel of the church, it was held no bar to the action that the rector had before sued the defendant, and recovered damages for dilapidations in the rectory-house, outhouses, &c., &c.

*Young v. Mumby*, 4 Maul. & S. 183; and see 1 Camp. 252.

Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the action to show that they are not the same.

The plaintiff declared for money had and received: the defendant pleaded a judgment recovered for 4000*l.*, in an inferior court in Wales, for the same causes. The plaintiff replied, that the causes were not the same. It appeared that the defendant had received, as plaintiff's steward, large sums of money on his account, to a greater amount than the sum for which plaintiff declared in the inferior court; and that plaintiff, believing that defendant had no available property beyond that amount, took judgment by default, and verified for only 3500*l.* The court held, that all those sums which plaintiff knew to be due from defendant, when he commenced the first suit, were to be considered as causes of action for which he had before recovered judgment.

*Lord Bagot v. Williams*, 3 Barn. & C. 235; 5 Dow. & Ry. 85, S. C.]

If A says B is perjured, and thereupon B brings his action, and A justifies, and issue is thereupon taken and found for the defendant, and judgment thereupon given, and after A again publishes the same words of B, and thereupon B brings another action, and A pleads the first judgment in bar, this is a good plea.

2 Brownl. 49, *Stiles v. Baxter*.

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If an alderman of N brings an action for these words, *he is a rascally alderman, a factious alderman, a lampooner*, and avers, that a lampooner is there understood of a libeller, and the defendant pleads a former action brought for the same words, and laid in the same manner, (saving only that in the first action no interpretation is given to the word *lampooner*,) in which action the plaintiff was barred, this is a good plea; for the plaintiff having been once barred, shall not entitle himself to a new action by a new interpretation of the same words.

3 Lev. 248, *Gardiner v. Helvis*.

In case for erecting a nuisance 2 *die Feb.* the defendant pleaded a prior action brought for erecting a nuisance 20 *die Martii*, and a recovery thereupon, and avers these to be the same nuisance and erection; plaintiff demurred, and judgment against him, for he may have an action for the continuing of the same nuisance, but can never have a new action for the same erection.

Salk. 10, pl. 3; Ld. Raym. 370, *Johnson v. Long*; Carth. 456, S. C. adjudged, because the plaintiff had not laid any continuance of the nuisance in his declaration.

But, though an action will lie for continuing a nuisance, yet it hath been held, that in assault, battery, and mayhem, if the plaintiff in his declaration recites a judgment in a former action for the same battery, and shows that he has since sustained consequential damages by a piece of his skull's coming out; yet this will not entitle him to a new action; for *per* Holt, C. J., every new dropping is a nuisance; but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages which the jury must be supposed to have considered at the trial.

Salk. 11, pl. 5; *Fetter v. Beale*, Ld. Raym. 339, 692; 12 Mod. 542.

In a plea in bar, to a penal action at the suit of a common informer of a prior suit and recovery for the same penalty in the name of a third person, the plea must distinctly aver that such suit was commenced before the present action, so that the plaintiff may traverse it.

*Eastham v. Curtis*, 1 Conn. 323.

A former recovery and satisfaction, in an action between the same parties, and for the same cause, is a good bar, (a) but when the former cause is only apparently for the cause, it is not conclusive, but only *prima facie* evidence. (b)

(a) *Rice v. King*, 7 Johns. 20; *Johnson v. Smith*, 8 Johns. 299, 2d edit.; *Thomas v. Rumsey*, 6 Johns. 26. (b) *Snider v. Croy*, 2 Johns. 227.

When several matters have been submitted to a jury, their verdict and a judgment upon it will be a bar to another action, though they separated the plaintiff's demand, in passing upon it, and gave no verdict upon a part.

*Brockway v. Kinney*, 2 Johns. 210; 11 Johns. 530.

A former verdict and judgment in replevin for the plaintiff, on the issue of no rent in arrear, form a bar to a recovery in an action for use and occupation for the same rent.

*Cist v. Zeigler*, 16 S. & R. 282.

The plea of former recovery must show that the suit is brought for the same cause of action and between the same parties.

*Hampton v. Broom*, 1 Miles, 241. See 2 Watts, 14.

To an action on a bond against one of two joint and several obligors,

(I) *Plea in Bar, &c. (Tender and Justification.)*

the defendant cannot successfully plead as a former recovery that an amicable action was instituted before a justice of the peace on this bond, against both the obligors, to which one appeared and confessed judgment.

*Sadler v. Slabaugh*, 2 Watts, 73. See *Vanamer v. Herdman*, 3 Watts, 203; *White v. Reynolds* 3 Penna. R. 96.

14. *Plea of a Tender.*

A being sued on a promissory note executed in Vermont, and payable at the Vermont State Bank, for four thousand dollars, without interest, pleaded in bar a tender of a certain sum in full of the debt and costs; the plaintiff replied new matter, without traversing the sufficiency of the sum tendered; to which replication the defendant demurred; held, that the plea was good, although, on the face of the declaration and pleadings, computing the interest at six *per centum per annum*, the sum tendered appeared to be less than the plaintiff's demand.

*Vermont Bank v. Porter*, 5 Day, 316.

Covenant to deliver whisky at the covenantor's distillery upon a certain day; plea "that he was ready on the day, but neither the plaintiff, nor any one on his behalf, attended with vessels to receive it." Held, insufficient for want of a statement of the time when he attended.

*Jewett v. Wagon*, 2 Bibb, 269.

Covenant for a non-conveyance of land, the defendant pleaded tender of a deed according to the true intent and meaning of the covenant. The plea was insufficient in not making a profert of the deed.

*Sook v. Knowles*, 1 Bibb, 283.

Plea of tender made in the absence of the plaintiff ought to show it was made at the uttermost convenient time of the day.

*Colyer v. Hutchings*, 2 Bibb, 404; *Duckham v. Smith*, 5 Monr. 374; *Kendall v. Talbot*, 1 Marsh, 322; *Jewett v. Wagon*, 2 Bibb, 269.

Upon a plea of tender and refusal, the money must be brought into court, and this must be stated in the plea. (a) This plea need not, however, be pleaded with an "*uncore prist.*"

(a) *Slack v. Price*, 1 Bibb, 275. *Mitchell v. Gregory*, 1 Bibb, 452.

15. *Plea of Justification.*

In a plea of justification to an action for a libel, each particular charge must be justified.

*Rigs v. Denniston*, 3 Johns. Cas. 198. Vide 19 Johns. 349; 20 Johns. 204.

In a plea of justification of a libel, it is no excuse for general pleading, that the subject comprehends a multiplicity of facts, nor is it sufficient that the plea is as general as the charge in the declaration; it must state the particular facts which constitute the charge, with certainty, so that the plaintiff may take issue upon them.

*Van Vess v. Hamilton*, 19 Johns. 349.

In an action of trespass, if the defendant justify under an execution, the general allegation that the execution was regularly issued on a lawful judgment, is sufficient.

*Hamilton v. Lyman*, 9 Mass. 14.

It is no justification for a libel, that the plaintiff had previously defamed

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the defendant, and that the defendant published the words in his own defence.

*Walker v. Winn*, 8 Mass. 248. See 1 Rep. Const. Ct. 80.

When the defendant, in an action for a libel, justifies as to part of the charge, but not to the whole, the plea will be good on demurrer.

*Sterling v. Sherwood*, 20 Johns. 204; *Eales v. Sharkleford*, 1 Lit. 35.

A defendant may justify a part and deny the residue of the trespasses charged against him; but the whole gravamen must be answered in the same plea.

*Underwood v. Campbell*, 13 Wend. 78.

In a plea of justification by an officer for taking property in satisfaction of a rate or tax imposed by an incorporated aqueduct company, it is not required to aver the incorporation of the company; it is enough to aver that by the act of incorporation the original corporators were declared a body corporate and politic in fact, if such are the terms of the act.

*Beekman v. Traver*, 20 Wend. 67.

A declaration in slander that the defendant said "B is a thief, he has stolen corn." The defendant pleaded "that the said plaintiff is a thief, and this he is ready to verify," &c. The plea is bad. The defendant, in order to justify, must confess the speaking of the words, and allege the plaintiff was guilty of a felony of that species mentioned in the declaration, and specify the nature of it.

*Samuel v. Bond*, Lit. Sel. Cas. 158.

16. *Of altering Pleas, and curing Defects in Pleading.*

When the parties enter into an agreement that the cause shall be tried upon a certain plea, the court cannot afterwards admit any other pleas without the consent of both parties.

*Furst v. Overdeen*, 3 Watts & S. 470.

In a *scire facias* against an administrator on a judgment against the intestate, the parties agreed that the merits of the original judgment should be tried without regard to the form of the pleadings: when the cause was ordered for trial, the defendant requested leave to enter the plea of *plene administravit*, and no assets, which was refused: held that this was error.

*Robeson v. Whitesides*, 16 S. & R. 320.

A defendant cannot withdraw any of his pleas, without leave of the court or consent of the adverse party, when he gains an advantage by so doing. (a) And he has no right to strike out one of them in order to obtain the benefit of conclusion to the jury. (b)

(a) *Wykoff v. Perot*, 1 Yeates, 38; *Jackson v. Winchester*, 2 Yeates, 529. (b) *Wagoner v. Line*, 3 Binn. 589.

The court allowed the plea of *non assumpsit* to be struck out after the jury was called to be sworn, where the plaintiff had not been put to any trouble or inconvenience in procuring testimony to prove the *assumpsit*.

*Rankin v. Cooper*, 2 P. A. Brown, 13.

Leave to add a plea of *non est factum* was refused, unless the defendant made affidavit denying the execution of the instrument, where the cause had been at issue eighteen months.

*Bullock v. Van Pelt*, 1 Bald. 463.

## (K) Duplicity in Pleading.

A declaration or other pleading setting forth a good title or ground of action defectively will be cured by a verdict.

*Reed v. Chelmsford*, 16 Pick. 128; *Worster v. Canal Bridge*, 16 Pick. 541; *Wheeler v. Train*, 3 Pick. 255; *Cushing v. Adams*, 18 Pick. 110; *Ward v. Bartholomew*, 6 Pick. 409; *Avery v. Tryingham*, 3 Mass. 160; *Crocker v. Whitney*, 10 Mass. 316; *Moor v. Boswell*, 5 Mass. 306; *Riddle v. Locks and Canals*, 7 Mass. 169; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Richardson v. Eastman*, 12 Mass. 505; *Coffin v. Coffin*, 2 Mass. 358; *Ingersoll v. Jackson*, 9 Mass. 495; *Livermore v. Boswell*, 4 Mass. 437.

In trespass, the plea of justification, on an execution issued by a justice of the peace, ought to show that the amount of the execution was within the jurisdiction of the justice, and that it was levied before the return day.

*McMurtry v. Henry*, 4 Bibb, 410.

In trespass for an assault and battery, when the declaration contains several counts charging it in different ways, the defendant, when he desires to justify, should plead that they were one and the same, and justify as to one only.

*Hardin v. Harrison*, 2 Bibb, 78.

A replication to a plea by a wrong name is a waiver for any exception for that error.

*Hutchinson v. Brock*, 11 Mass. 119.

A sur-rejoinder which shows that the plaintiff has no title will cure a departure in the preceding pleading.

*Keay v. Goodwin*, 16 Mass. 1.

A plea bad for the omission of material averments is cured by the subsequent pleading of the other party supplying those averments.

*Slack v. Lyon*, 9 Pick. 62; *Dunning v. Owen*, 14 Mass. 157; *Dorr v. Fenne*, 12 Pick. 521.

Joining issue to the jury on a plea which puts in issue the construction of a written contract under seal, cures the defect.

*Williams v. Woodman*, 8 Pick. 78.

A defendant pleaded his bankruptcy and certificate of discharge defectively: held, that a replication impeaching the certificate of discharge for fraud and a verdict cured the defect.

*Jenkins v. Stanley*, 10 Mass. 226.

When no title or ground of action is set forth, the declaration will not be aided by verdict.

*Williams v. Hingham Turnpike*, 4 Pick. 341.

## (K) Duplicity in Pleading: And herein,

1. *The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.*

THE plea, says my Lord Coke, that contains duplicity or multiplicity of distinct matter to one and the same thing, whereunto several answers (admitting each of them to be good) are required, is not allowable in law; and this rule, says he, extends to pleas perpetual or peremptory, and not to pleas (a) dilatory, for in their time and place a man may use divers of them. Also where the tenant or defendant may plead the general issue, there, upon the general issue pleaded, he may give in evidence as many distinct matters to bar the action or right of the defendant or plaintiff as he can: also a special verdict may contain double or treble matter, and therefore in those cases the tenant or defendant may either make choice of one matter, and so



## (K) Duplicity in Pleading.

plead it to bar the demandant or plaintiff, or plead the general issue, and take advantage of all; or he may plead to part one of the pleas in bar, and to another part another plea; and his conclusion of his plea shall avoid a doubleness; and hereby neither the court nor the jury is so much inveigled as if one plea should contain divers distinct matters: and if the tenant make choice of one plea in bar, and that be found against him, yet he may resort to an action of a higher nature, and take advantage of any other matter.

Co. Lit. 304 a; Doct. pl. 135. [See Stephen on Pleading, 271, 279;] *β* Bruce v. Mathers, 2 Bibb, 297; Lord v. Tyler, 156; Dunning v. Owen, 14 Mass. 157; Tucker v. Randall, 2 Mass. 283; Oystead v. Shed, 13 Mass. 520; Rathbone v. Rathbone, 5 Pick. 221; Otis v. Blake, 6 Mass. 336; Commonwealth v. Eaton, 15 Pick. 273; Commonwealth v. Tuck, 20 Pick. 356; Commonwealth v. Hope, 22 Pick. 1; Nichols v. Arnold, 8 Pick. 172; Parker v. Parker, 17 Pick. 236.*g* [Duplicity is, where distinct matters, not being part of one entire defence, are attempted to be put in issue. But this does not preclude a party from introducing several matters into his plea, if they are constituent parts of the same entire defence. For though it be true, that issue must be taken upon a single point, yet it is not necessary that such single point should consist only of a single fact. For instance, the point of the plea may be, that the defendant is entitled to common; but to establish this point several facts may be necessary, as, that the cattle with which he is to use the common must be his own cattle, must be levant and couchant, &c. Robinson v. Rayley, 1 Burr. 316;] {3 Cain. 160, Strong v. Smith; 2 Johns. Rep. 462, Patcher v. Sprague; 3 Johns. Rep. 315, Cooper v. Heermance.}—(a) But where the defendant pleaded ten outlawries on *meane* process in disability, to which the plaintiff demurred for duplicity, it was held that the plea was naught; and the diversity between a plea in bar and abatement as to duplicity being urged, it was answered by the court, that there was a difference between a plea of an outlawry in disability and other pleas in abatement; and that this plea was ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required. Carth. 8, 9. *β* In *assumpsit*, that in consideration of the plaintiff procuring the discharge of one S, whom he had taken in execution, the defendant would pay a certain sum to the plaintiff; plea that S at the time was privileged as a member of parliament, and not liable to be taken in execution, and had been discharged by a judge's order, and no consideration for the defendant's promise: held bad for duplicity, and as an argumentative denial of the discharge being the plaintiff's act. Butcher v. Stewart, 1 Dowl. N. S. 620; 9 Mees. & W. 405.*g*

The reasons why duplicity in pleading is a fault are, that the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same, and thereby put an end to the cause; whereas the party pleading such double matter must be presumed conusant of his own strength, and therefore ought to put his defence on that single point, which will put an end to it. Besides, the jury ought not to be charged with multiplicity of things, when finding any one of them contrary to their evidence lays them liable to the severity of an attain.

5 H. 7, 7; Doct. pl. 135; Plow. 194; Yelv. 13; Roll. R. 112; Vent. 47, 48.

Also, from the expense and vexatiousness attending it, a person is no more allowed to plead and demur to the same fact than he is to plead double; for the duplicity herein draws the matter to a different *examen*, since the demurrer is to be tried by the court, and the fact by a jury.

Vide under the division *Demurrer*; and vide 11 Co. 52.

So where one confesses and avoids, and likewise traverses the same point, this is in nature of a double plea, and therefore naught.

2 Vent. 212; 3 Mod. 318; Co. Ent. 504.

But though duplicity in pleading be a fault, yet must the same be taken advantage of on a special demurrer, that is, the party must show wherein

## (K) Duplicity in Pleading.

the doubleness consists; and it is not sufficient to demur *quia duplex et card formid*, &c., but he must lay his finger on the very point that is so.

2 Roll. R. 306; Lutw. 4; 3 Mod. 251; Ld. Raym. 332; Comb. 65; Poph. 113; Lev. 76; Salk. 219, pl. 5; 2 Ld. Raym. 798; 2 Salk. 678, pl. 5; 7 Mod. 71; {2 Johns. Rep. 433, Currie & Whitney v. Henry; } and vide title *Demurrer*, more authorities to this purpose.

If a plea is pleaded which is double, and the adverse party demurs not for the doubleness, he is obliged to answer both parts.

1 Vent. 272.

## 2. What shall be said Duplicity in Pleading.

A plea may contain as many facts as are necessary to constitute one defence, and it is not on that account a double plea.

Patcher v. Sprague, 2 Johns. 463.

Duplicity consists in alleging two or more distinct matters, each of which would be as effectual an answer as all.

Lord v. Tyler, 14 Pick. 156.

The introduction of matter of inducement or surplusage, of itself, not constituting a defence, does not constitute duplicity.

14 Pick. 156; Dunning v. Owen, 14 Mass. 157.

In trespass for assault and battery, defendant justifies by a *molliter manus imposita* for due correction of the defendant as his servant, and pleads over, that since that time the plaintiff *exoneravit et relaxavit* (without saying *per scriptum*) to the defendant the said matter; to this plea it was demurred for doubleness specially; and the opinion of the court was, that it was double; for though the release be not sufficiently pleaded, yet it is pleaded so as issue may be taken upon it, which will be expensive and vexatious to the plaintiff: but, had it been really no plea at all, or such a one on which no issue could be taken, then it had been only surplusage,<sup>(a)</sup> and, consequently, could not amount to a double plea.

Sid. 175; Keb. 661, Bleke v. Grove. [See Com. Dig. *Pleader*, (E) 2.] <sup>(a)</sup> Matter of surplusage shall never make a plea double. 1 H. 7, 16; Dyer, 42 b; Doct. pl. 138, S. P.

In an action of false imprisonment the defendant justifies by force of a *latitat* out of B. R., by force of which he took him; the plaintiff replies that he did it *de injuriâ suâ propriâ*, &c.: it was moved that this was naught after a verdict, and not helped; but the court held it well after a verdict, but that upon a demurrer it would be naught, as being multifarious, jumbling <sup>(b)</sup> matters of record and matters of fact together, and putting both into the mouth of the *lay gens*.

Raym. 50; Keb. 125, 164, Beesly v. Walker. <sup>(b)</sup> For this vide Hob. 244; Hutt. 20; Sid. 314. [The replication is bad in such case, not for putting several matters in issue, (for that is often done where *de injuria*, &c., is replied,) but because it puts in issue the writ which is matter of record. See 6 Co. 67 a; Com. Dig. *Pleader* (F), 19, 20.]

In debt on an obligation, the defendant pleaded, it was on condition that he stood to the award of certain persons, so that it were delivered in writing, and said that no award was made or delivered in writing; and this plea was held naught for duplicity, for the award might be made in one county, and might be delivered in another, and so the same jury not proper judges of both these facts.

5 H. 7, 7; Dyer, 242 a; Doct. pl. 136; [and vide 2 Moo. 23.]

In debt upon an obligation, if the defendant says that the obligation was

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made by duress of imprisonment, and by menace of imprisonment, this is a double plea.

Plow. 140; 19 E. 4, 4. But, if an executor *plene administravit*, and so *riens in mains*, this is not double, being only an inference necessarily following from his plea. 1 H. 7, 15; 18 H. 8, 4; Dyer, 243.—In debt for rent *nihil debet* and *nihil habuit in tenementis* held to be double and repugnant. Vide 4 Mod. 254.

In a *scire facias* on a fine, as heir to two parceners, the tenant pleaded in bar a fine levied by the two parceners with warranty, and he relied on the warranty; and that plea was held double, and he forced to rely on the warranty of one.

Co. Lit. 304; Hob. 29.

So, if one have divers warranties, and they fall by descent on one person, heir to both, yet he must be vouched as heir to one only; for as to the demandant, the voucher is a kind of plea in bar, and ought to be single; for the demandant may counterplead the possession of the vouchee and his ancestors, which he cannot do if they be divers; and as to the vouchee, the voucher is a kind of demand or suit, and ought to be single; for the vouchee may counterplead the lien, which he cannot do if they be divers.

Co. Lit. 304; Hob. 29.

In debt on a penal bill of 7*l.* for the payment of ten shillings at one day and ten shillings at another, and so till the whole was paid; the plaintiff assigns the breach, that the defendant did not pay on the said several days, &c.; the defendant pleads an insufficient plea, the plaintiff replies, and the defendant demurs generally: in this case it was held, that no exception could be taken on the general demurrer to the declaration for the doubleness, but judgment should go against the defendant for the insufficiency of his plea.

2 Vent. 198, 222; Saund. 338.

In covenant on a lease, wherein the lessee covenanted to pay his rent yearly by equal portions at Michaelmas and Lady-day, the breach assigned was, that he did not pay the rent due at the aforesaid several feasts during the term; and though it was objected, that the breach was not well assigned, but ought to have been so particularly, yet it was resolved to be well enough, for perhaps it was never paid at any of the days; and this differs from the case last above-mentioned, for there, the assignment of non-payment at any one of the days was sufficient to entitle him to the penalty of the bill.

Lev. 79.

In debt against an executor who pleads several judgments had against him, &c., the plaintiff replies to each severally, that it was had by fraud to bar him of his debt. The replication is clearly double, because if he had avoided any one of the judgments he should have had a general judgment against the defendant, his plea being entire; (a) yet in this particular case this pleading is allowed, for he may be mistaken in one; and in this case he has it in his election to plead fraud to them all severally, or to any of them, omitting the others; and if payment of several obligations had been alleged, the plaintiff might traverse the payment of each severally, or any of them; and though he mistake some of the sums to which he pleaded *non solvit*, yet it shall not hurt; for it is no more than if he had said nothing to them; and in the case of several judgments the plaintiff may reply, that one was obtained by fraud, that satisfaction is acknowledged on record on another, and so avoid each by a different plea.

2 Saund. 48, 49; Trethewy v. Ackland, Lev. 281; and vide 1 Mod. 33; 2 Mod. 36;

## (K) Duplicity in Pleading.

2 Keb. 591; 2 Sand. 336; 4 Mod. 54, 63; Carth. 195. (a) This is called an anomalous case against the rules of law, which condemn double pleading; but in this case it hath several times been allowed. 2 Sand. 48; Comb. 444; Ld. Raym. 263; Salk. 298, pl. 10; Carth. 429; 12 Mod. 153. [See Williams's note 2, 1 Saund. R. 337 a.]

¶ And in a plea of set-off the defendant may rely on a debt of record and a debt of simple contract, though one creates an issue to be tried by the court, and the other an issue to be tried by the country; and the plaintiff in such case may reply as to the record *nul tiel record*, and as to the residue *nil debet*.

1 East, 369, 372.¶

If a man pleads two things where he is compellable to show both, this does not make his plea double.

Plow. 194; Doct. pl. 136.

As, where to a plea in abatement in trover that another action depends by B and C for the same cause, the plaintiff replied that they are both dead; this replication is not double, for he must show the death of both to enable him to bring the action alone.

2 Lev. 82; Vent. 236.

If there are three in execution jointly at the suit of A, and all escape, the plaintiff may declare for the escape of all, and it will not be double, though the escape of any one of them will be (a) sufficient to entitle him to the action.

Keilw. 68; Stile, 82. (a) For this vide Sid. 5; Skin. 583, and title *Escape*.

In detinue by Dame Audley the defendant pleads, that after bailment of the goods to him by the plaintiff she married Lord Audley, and that during such marriage the Lord Audley released to him all actions, &c. It was objected that this plea was double, viz., property in the husband by the inter-marriage, and a release by him; but it was resolved not double, because he could not plead the release without showing the marriage.

Moor, 25, pl. 85, Dame Audley's case; Dalis. 30, pl. 9, S. C. [See Stephen on Plead. p. 274.]

{To a declaration in debt against a sheriff for an escape, the defendant pleaded an involuntary escape and the return of the prisoner into custody before any action brought, and also that the prisoner was discharged pursuant to an act for the relief of insolvent debtors; and the plea was held good, and free from duplicity. The defendant could not have pleaded the involuntary escape, and return before action brought, without also alleging that the prisoner was, at the time of the plea pleaded, in his custody. And if he had relied solely on the discharge, then at the trial he might have been surprised, and in fact charged for the involuntary escape. So that both facts were necessarily blended in his defence, and went to one point, viz., an escape for which he was not responsible.

2 Johns. Rep. 433, Currie & Whitney v. Henry.}

¶ No matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point. Thus, in an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest: for all of them taken together do but amount to one connected cause of suspicion.

Vin. Abr. *Double Pleas*, (A) 7, citing 2 Ed. 4, (B).

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This qualification of the rule against duplicity applies not only to pleadings in confession and avoidance, but to traverses also: so that a man may deny, as well as affirm, in pleading, any number of circumstances that together form but a single point or proposition. Thus, in an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff in his replication traversed, "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle." On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be sufficient of itself: but the court held that the point of defence was, that the cattle in question were entitled to common; that this point was *single*, though it involved the *three several* facts—that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only traversed the single point, whether the cattle were entitled to common, and was, consequently, not open to the objection of duplicity.

Robinson v. Raley, 1 Burr. 316.¶

§ The defendant pleaded two pleas of payment to an action on a bond, one before the day, and the other at the day; the court on motion ordered the first plea to be stricken out.

Thayer v. Rogers, 1 Johns. Cas. 152.

*Nul tiel record* cannot be joined with a plea of payment, for *nul tiel record* cannot be joined with any other plea.

Carnes v. Duncan, Colem. 35.

A plea in trover, stating that the goods were sold by order of the plaintiff, on commission, and also that the defendant was discharged under the insolvent laws, is bad.

Kennedy v. Strong, 10 Johns. 289.

A plea may contain all the facts necessary to constitute one defence, and it is not considered as double on that account.

Patcher v. Sprague, 2 Johns. 262.

In replevin the defendant may plead *non cepit* and property in himself.

Sheeter v. Page, 11 Johns. 196.

Where to a plea of the statute of limitations, the plaintiff replies the suing out of process, and a promise within six years previous to such process, a rejoinder denying both the suing out of process and the promise alleged in the replication, is bad for duplicity.

Tuttle v. Smith, 10 Wend. 386.

A plea by a vendor that he was not requested to convey, and that he did not refuse, is bad for duplicity on special demurrer.

Connelly v. Pierce, 7 Wend. 129.

Debt on a judgment obtained in Georgia, defendant pleaded *nul tiel record* and *nil debet*; the court ordered the defendant to elect within four days after notice, or in default, the plaintiff to elect to which of the two pleas he should stand

Le Conte v. Pendleton, 1 Johns. C. R. 104; S. C. Colem. Cas. 72.¶

## (K) Duplicity in Pleading.

3. *Of pleading double by Leave of the Court.*

This depends on the statute 4 & 5 Ann. c. 16, for amendment of the law, by which it is enacted, "That any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record, may, with leave of the same court, plead as many several matters thereto as he shall think necessary for his defence; and if any such matter shall on demurrer joined be judged insufficient, costs shall be given at the discretion of the court; or if a verdict be found upon any issue in the said cause for the plaintiff or defendant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him."

4 & 5 Ann. c. 16. ||As to the motion to plead double, the drawing up the rule, the costs, &c., see Tidd's Prac. 657, 658, (9th edit.)||

In the construction of this branch of the statute the following opinions have been holden:

That a person cannot plead and demur to the same part of the declaration; also, that pleading double is at the peril of the pleader; and if the court give him leave in cases where they have no power by the act so to do, the other party may demur.(a)

Cases in Law and Equity, 281, 327. (a) *Qu.* If the proper method is not to move the court to discharge the rule.

It is held, that these double pleas must be to the plaintiff's declaration, and that therefore the defendant cannot rejoin two several matters to the plaintiff's replication.

T. 5 G. 2, in B. R., *Warren v. Ives*; 2 Stra. 908, S. C.—Whether to a writ of error to reverse a common recovery the defendant may plead double. Cases in Law and Equity, 326. *Dubitatur.*

It was moved, that an executor being likewise heir at law might have leave to plead double, *viz. solvit ad diem*, and *riens per descent*, to an action of debt upon a bond; but the court refused the motion, without an affidavit that he had *riens per descent*, and said, that there is the same law in case of an administrator, who shall not be allowed to plead *plene administravit*, and no assets, without affidavit.(b)

Trin. 2 G. 1, in B. R., *Carrington v. Warren*. (b) The common plea of *plene administravit*, as now used, includes an allegation that the defendant hath not, nor at the commencement of the suit had, any assets, and the whole makes but one plea, and is not double.

So, in covenant for non-payment of rent, as assignee of several terms, the plaintiff set out his title under several deeds, and the defendant moved to plead eight pleas; but, because he had not an affidavit to prove them material to the merits of the cause, the motion was denied. And here the court observed, that this statute was not designed to put the plaintiffs under unnecessary difficulties in proving issues foreign to the merits of the matter in question: and though they are to allow any person that asks the favour of pleading double to use the benefit of the act, yet are they to see the design of it is not abused in multiplying fruitless and impertinent issues.

Hil. 7 G. 2, in B. R., *Sir Charles Peers v. Whale*.

It hath been frequently insisted upon, that a defendant could not within this act plead contradictory and inconsistent pleas; as *non assumpsit* and the statute of limitations, &c. But the court observing, that if the benefit of

## (K) Duplicity in Pleading.

the statute was to be confined to such pleas as are consistent, it would hardly be possible to plead a special plea and a general issue, the one always denying the charge, the other generally confessing and avoiding it; and as the statute itself makes no distinction herein, hence it hath been held,

That in debt for rent the defendant may plead a tender and eviction.

Hil. 8 G. 1, in B. R., Cary v. Jenkins; 1 Stra. 496, S. C.

So, an action upon articles under hand and seal relating to *South Sea* stock, defendant had leave to plead *non est factum*, *non obtulit*, *non dedit notitiam secundum* the proviso in the deed, and that the deed was not registered.

Isaac and Sir William Gordon, in *Seacc.*

So, not guilty and *son assault demesne* was pleaded by leave of the court. (a)

Mich. 2 G. 2, in B. R., Smith v. Smallwood. (a) And is now the common practice without exception.

So, in debt upon a bond, the defendant was permitted to plead *non est factum* and bankruptcy.

Trin. 3 G. 2, in B. R., Atkinson v. Atkinson; 2 Stra. 871, S. C.; and Mich. 8 G. 2, S. P. between Phillips and Wood; 2 Stra. 1000, S. C.

{So *non est factum* and usury.

2 Bos. & Pul. 12, Lechmere v. Rice.}

In an action on the case against the postmaster-general, it was allowed him to plead *non culp. et non culp. infra sex annos*.

Hil. 4 G. 2, in B. R., Decosta v. Carteret; 2 Stra. 889, S. C.; Fitzgib. 189, S. C.; Barnard. K. B., 407, S. C.

In trespass the defendant had leave to plead a license and justify the cutting down some boughs, because they hung over his gardens; though it was objected, that these pleas were inconsistent, the license being a tacit or implied acknowledgment that he had no right to cut the boughs, whereas the justification asserts one.

Trin. 5 G. 2, in B. R., Bohun v. Morgan.

In debt upon a bond given by a woman, conditioned that she should marry the plaintiff, if he requested, within ten days after his return from sea, leave was given to plead *non est factum*, and that she was never requested.

Trin. 5, G. 2, in B. R., Dun v. Vauacher; 2 Stra. 908, S. C.

In debt for rent upon a parol demise, defendant had leave to plead *nil habuit in tenementis et non dimisit*.

Mich. 6 G. 2, in B. R., Semining v. Bygrove.

[A defendant shall not be allowed to plead *non assumpsit*, or *non est factum*, to the whole declaration, and a tender as to part; for one of these pleas goes to deny that the plaintiff had any cause of action, and the other partially admits it.

Maclellan v. Howard, 4 Term R. 194; Jenkins v. Edwards, 5 Term R. 97.

Neither shall he be allowed to plead several matters, which require different trials, as, in dower, *ne unques accouple en loyal matrimoine*, and a mortgage, or *ne unques seisie que dower*; for the first matter is triable by the bishop, and the others by a jury; and if the former be found against the defendant, the judge cannot certify that he had a probable cause of pleading it.

Anderson v. Anderson, 2 Black. R. 1157; Hillier v. Fletcher, Ibid. 1207; Robins v. Crutchley, 2 Wils. 118; Semb. *contr.*

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{Nor will he be allowed to plead *non assumpsit* and alien enemy, as alien enemy may be given in evidence on *non assumpsit*.

2 Bos. & Pul. 72, *Thyatt v. Young*; 1 Bos. & Pul. 222, n., *Angerstein v. Vaughan*.

For the same reason, in an action on a note, *non assumpsit*, and that the note was given on a stock-jobbing transaction, contrary to statute, cannot be pleaded together.

1 Bos. & Pul. 222, *Shaw v. Everett*;} .

[A defendant will not be allowed to plead *non assumpsit* and the stock-jobbing act, or *non assumpsit* and alien enemy; and a plea of tender to one count, and alien enemy to another, cannot be pleaded together; nor can alien enemy be pleaded together with a special justification in trespass inconsistent with it. And in a late case the court refused to permit the defendants (assignees of a bankrupt) to plead *non est factum*, and also that the premises did not come to them by assignment.

1 Bos. & P. 222; 2 Bos. & P. 72; 10 East, 326; 12 East, 206; *Whale v. Lenny*, 5 Bing. 12; and see 5 Bing. 42; 4 Bing. 525; 3 Bing. 635; 2 Bing. 325.]

This statute of the 4 & 5 Ann. does not extend to any action, or information, upon a penal statute.

*Morgan v. Lockup*, Ca. temp. Hardw. 262; 2 Stra. 1044, S. C.; *Law v. Crowther*, 2 Wils. 21; *Lookup v. Frederick*, Barnes, 365; *Heydrick v. Foster*, 4 Term R. 701.]

{When the king is plaintiff in a *quare impedit*, the defendant cannot plead double under this statute.

Willes, 533, *The King v. Archbishop of York*; Barnes, 353, S. C.

The pleas must contain, in each of them, sufficient matter to bar the plaintiff's action. One plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself.

Willes, 380; 2 Johns. Rep. 437; 2 Mass. T. Rep. 543.}

[And the king is not bound by this statute, and where he is plaintiff the defendant cannot plead double without leave of the attorney-general.

Willes, R. 533.

Under special circumstances, and where the defendant is obviously using the rule of the court for the purpose of mere delay, the court will rescind the rule, and oblige the defendant to abide by one of his pleas.

13 East, 255.

By stat. 32 Geo. 3, c. 58, it is enacted, that it shall be lawful for the defendant to any information in the nature of a *quo warranto* for the exercise of any office or franchise in any city, borough, or town corporate, to plead that he had first actually taken upon himself, or held or executed the office or franchise, which is the subject of such information, six years or more before the exhibiting of such information; which plea shall and may be pleaded either singly, or together with, and besides such plea as he might have lawfully pleaded before the passing of the act, or such several pleas as the court on motion shall allow. In the construction of which statute it has been holden that the legislature intended to give a defendant, in such a proceeding, the liberty of pleading several pleas, whether with or without the plea of the statute of limitations; the concluding words of the act being "or such several pleas," &c.(a)

(a) 8 Durnf. & East, 467.



## (L) Departure in Pleading.

But this statute, as well as the 9 Ann. c. 20, § 4, &c., is confined to corporate offices, (a) and it does not apply where there is a continuing incompatibility, as where a burgess has accepted the office of town-clerk, which he still exercises. (b) And for preventing the vexation and expense occasioned to defendants in informations in the nature of *quo warranto*, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the court, it is a rule (c) that the objections intended to be made to the "title of the defendant, shall be specified in the rule to show cause; and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the court, or of some judge thereof."

(a) 9 East, 469; but see 5 Barn. & Ald. 771; 1 Dow. & Ry. 438, S. C.; and see further, as to pleading several pleas; 1 Chitt. pl. 540, S. C.; Stephen on Plead. 288. (b) 2 Chit. R. 371. (c) R. H. 7 & 8 G. 4, K. B., 6 Barn. & A. 267. See Tidd, 656, (9th edit.)

## (L) Departure in Pleading.

A DEPARTURE in pleading is, when the second plea contains matter not (d) pursuant to the former, and which does not fortify the same; and when the rejoinder contains matter subsequent to the bar, and not fortifying the same, this is regularly a departure.

2 East, 4, 12; Plow. 105; Co. Lit. 304; Doct. pl. 119. [See Com. Dig. *Pleader*, (F) 7, (F) 11; Vin. Abr. tit. *Departure*; 1 Arch. Plead. 247, 253; Stephen on Plead. 405.] β Where a declaration states a note as being payable to A and B, for value received, and by them endorsed for value received to C, and the replication states that the note was executed and delivered to A and B, as agents of, and in trust for the use of, the said C, this declaration fortifies and does not depart from the declaration. *Wilson v. Goodman's Ex'rs*, 3 Cranch, 193. γ (d) But, where a man pleads any thing which he could not have shown at first, it shall never be reckoned a departure; so where he fortifies it in the same manner that he pleaded it; but, if he fortifies it in another manner, as by a special custom, it will be a departure. For this vide *Yelv. 14*; *Dyer, 253*; *Style, 260*; *Jon. 262*; *Leon. 156*; *2 Leon. 199*; *3 Leon. 3, 203*; *Cro. Car. 357*; *Finch. 392*. δ A departure in pleading is fatal on general demurrer. *Stearns v. Paterson*, 14 Johns. 132. γ

In an assize the tenant pleads a descent from his father, and gives colour, the demandant entitles himself by a feoffment from the tenant himself, the tenant cannot say that the feoffment was on condition, and show the condition broken; for that were a departure, as containing new matter, and subsequent to the matter of his bar; but in assize, if the tenant plead in bar, that J S was seised, and enfeoffed him, the plaintiff shows that he himself was seised in fee till J S disseised him, who enfeoffed the tenant; the tenant may plead a release of the plaintiff to J S, for this fortifies his bar.

Doct. pl. 120; Plow. 104.

If a man plead an estate generally, as a feoffment in fee, he, without a departure, cannot maintain it in his second plea by matter tantamount; as, by a disseisin and release, or by a lease and release, or a gift in tail and a recovery in value; nor, when a man pleads an estate made by the common law, can he make it good by an act of parliament in his second plea.

Co. Lit. 304.

So, when a matter is pleaded at a common law, he cannot maintain it in his replication by custom; as, in covenant on an indenture of apprenticeship to serve seven years, and breach assigned, that he did not serve, &c., the

## (L) Departure in Pleading.

defendant pleads infancy ; the plaintiff replies the custom of London : and adjudged a departure.

Lev. 81 ; Keb. 376, 469, 512.

Nor can action at common law be made good in the replication by statute, as, in trespass for taking his beasts, the defendant justifies as damage-tenant ; the plaintiff replies he drove them out of the county ; and adjudged a departure ; for driving out of the county was not prohibited by the common law, but by the statute of Marl. (52 H. 3.) and 1 & 2 Ph. & M. c. 12.

3 Lev. 48.

But, if one pleads a statute, the other says it is repealed, he may reply that it is revived by another ; for this fortifies the first matter.

Lev. 81.

If a man pleads performance of covenants, the plaintiff replies, he did not do such an act according to the covenant ; the defendant says, he offered to do it, and he refused ; this is a departure, it being one thing to do a thing, and another that he offered to do it, but he refused.

Co. Lit. 304 a.

Debt against a clerk upon an obligation conditioned to perform covenants, one of which was to account for all money he should receive ; the defendant pleads performance ; the plaintiff replies, that such a day such a sum came to his hands, which he had not accounted for ; the defendant rejoins, that he accounted *modo sequente*, viz. : that thieves broke into the counting-house and stole it, and that he acquainted the plaintiff, *et hoc paratus est, &c.* And on demurrer it was resolved, that the rejoinder was no departure, for though it contained new matter, yet it was pursuant to the former ; for showing that he was robbed amounted to giving an account. 2dly, That the rejoinder, though an express affirmative, viz. : that he did account in contradiction to what was said in the replication, viz. : that he did not account, was yet good with an averment, without concluding to the country ; for new matter being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a sur-rejoinder and answer it, viz. : by traversing the robbery.

Vent. 121 ; 3 Lev. 5.

Debt on an obligation for performance of covenants, one of which was, to return certain goods from D, the defendant pleads performance ; the plaintiff assigns a breach in not returning such goods ; the defendant rejoins he had no order ; and held a departure, for there was no mention of order in the covenant : but, it seems, had the covenant been to return them on order, the plea had been good ; for then the covenant was not to be performed without order, and *performavit omnia* may be taken, that he performed all that he ought to perform, he not having orders.

2 Lev. 67.

In debt upon an obligation for performance of an award, the defendant pleads no award ; the plaintiff replies, and shows the award and breach ; if the defendant rejoins, and show that it is void, either because that there was an award of mutual releases to the time of the award, or that the award was all on one side, or that it was not made of all matters submitted, and whereof the arbitrators had notice, or the like, in all such cases the rejoinder is a departure ; for no award pleaded is no award at all, either in fact or in law,

## (L) Departure in Pleading.

which is not to be maintained by showing the award to be void, but he should at first plead the award, and also the matter whereby it was void.

Lev. 85, 127, 133, 300; Mod. 289, *Roberts v. Marriot*; {1 Wils. 192, *Harding v. Holmes*; 2 Saund. 186, *Roberts v. Mariett*, and 189, n. (3); 3 Johns. Rep. 367, *Barlow v. Todd*; 2 Cain, 320, *Munro v. Alaire*.}

||But where to debt on bond conditioned to perform an award, the defendant pleaded no award, and the plaintiff replied stating an award defectively, and the defendant rejoined setting out the whole award, from which it appeared that the award was not made conformably to the submission, and then demurred; it was held that there was no departure, for this rejoinder supported the plea, by showing that there was no legal or valid award.

*Fisher v. Pimbley*, 11 East, 188. ||

In debt for not performing an award, the defendant pleads no award; the plaintiff replies, and shows one, but does not show where it was made; the defendant demurs; and resolved that that could not be objected after no award pleaded, for that were a departure.

3 Lev. 239, 241.

In debt on a bond, conditioned to save a parish harmless concerning a bastard child which the obligor was forced to father, he pleads *non damnificat*; they reply, that the child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.*; defendant rejoins, that he was ready to repay the money and save the parish harmless: upon this they demurred, and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue upon the child's being ready to starve: if the plaintiffs had once been at any expense about the child, and were thereupon actually damnified, the defendant being ready to repay the money will not save the condition of the bond.

2 Saund. 80; Sid. 444; Mod. 43; 2 Keb. 612, 619, *Richards v. Hodges*.

In debt on a bond for performance of an award the defendant pleads no award; the plaintiff replies and shows it, and the breach; the defendant pleads, that it was not tendered; this is a departure; for though both be necessary by the condition of the bond to charge the defendant, viz.: that an award be made, and that it be also tendered, yet he ought to rely on either one or other, either being sufficient to bar the plaintiff; then, when he chooses one in his plea, viz.: that no award was made, he cannot after waive that in his rejoinder, and have recourse to the other, viz.: that the award was not tendered.

2 Sand. 189; Sid. 10.

In trespass for breaking his house and carrying away his goods, the defendant justified as a distress damage-feasant; the plaintiff replied, that after the distress, viz.: the same day, the defendant converted them to his own use; and on demurrer the replication was held no departure; for he who abuses a distress is a trespasser *ab initio*, and the converting is a trespass or trover, at election; and the bringing trespass determines his election, and the matter in the replication makes good that election; for it proves it a trespass as well as trover.

Salk. 221, pl. 1, *Gargrave v. Smith*.

{Defendant in an action of trespass by his plea justified taking the cattle

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damage-feasant, and afterwards rejoined that they were taken surcharging the common; this was held to be a departure.

Willes, 638, *Ellis v. Rowles*;}.

¶ The plaintiff declared in replevin for taking his goods and chattels, to wit, one lime-kiln. Avowry for rent in arrear. The plaintiff replied that the lime-kiln was affixed to the freehold, and, consequently, exempt from distress: on demurrer, the court held, that the plea in bar was a departure from the declaration.

Niblet v. Smith, 4 Term R. 504.

So, if to debt on annuity bond defendant plead, that no such memorial was enrolled as the statute requires, and plaintiff reply that there was a memorial containing the names of the parties, &c., the defendant cannot rejoin, stating a defect in the memorial; for such rejoinder departs from the plea.

Praed v. Duchess of Cumberland, 4 Term R. 585.

Where, however, to *scire facias* on a recognisance, the bail pleaded that no *ca. sa.* was *duly* sued, &c., according to the practice of the court, and the plaintiff replied, showing a *ca. sa.* into Middlesex, it was held no departure for the defendants to rejoin that the venue in the original action was in London; for that sustains the plea, and shows that no *ca. sa.* had *duly* issued.

Dudley v. Watchorn, 16 East, 39; *sed vide* 7 Barn. & C. 800.¶

In covenant for further assurances, &c., the defendant by protestation says that the plaintiff's counsel did not advise, &c., and for plea saith, that he was not required; the plaintiff replies that J S his counsel advised a release, and that he required the defendant to seal it, which he refused; the defendant rejoins that he did not refuse; this is a departure.

Dyer, 31 b; Doct. pl. 120.

The defendant pleads in bar a lease for fifty years made by a corporation, and after in the rejoinder pleads the proviso in the statute 31 H. 8, c. 13, which makes such leases good for 21 years; it was held, that the pleading the proviso was a departure, as not enforcing that which went before in the bar.

Dyer, 109; Doct. pl. 121.

If it be pleaded, that the parties to a fine *nihil habuerunt*, which is denied, and the defendant rejoin that the party had only a use in the land; this is a departure.

Dyer, 291; Doct. pl. 121.

If in bar to an action on a bond, conditioned to save the plaintiff harmless, the defendant pleads, that he did save harmless, and the plaintiff in his replication shows a damnification, to which the defendant rejoins that he had not notice thereof, this rejoinder is a departure.

Sand. 117; Lev. 194.

If a man lay a day in his declaration that is not material, and the defendant by his plea make it material, and then the plaintiff in his replication vary from the day in the declaration, it will be a departure :(a) otherwise, (b) if the day had not been material by the plea.

6 Mod. 115, *per* Holt, C. J. [(a) This part of the doctrine in the text is nothing more than a loose *dictum* of my Lord Holt, and is contradicted by authorities. For if the time laid in the declaration is immaterial, there, though it becomes material by the defendant's plea, yet the plaintiff in his replication may depart from it; as in trespass, Co. Lit. 282 a, b; 1 Salk. 222; 2 Ld. Raym. 1015, or trover, Oro. Car. 245, 333;

## (L) Departure in Pleading.

1 Salk. 222; or upon a general *indebitatus assumpsit*, 1 Stra. 22; 2 Stra. 806; 1 Lev. 110; 1 Keb. 566, 578; 10 Mod. 251; Fort. 375, where the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. And in actions for a transitory trespass, where the defendant pleads a local justification, the plaintiff, in his replication, may vary from the place laid in the declaration. 1 Ld. Raym. 120.] (b) For this vide Cro. Car. 229; 2 Mod. 31; 1 Salk. 222; 3 Lev. 348, tit. *Transverse*. —And that a departure in such case may be cured by pleading over and verdict. Lev. 110; Raym. 86; Keb. 566. [It is clear that the only mode of taking advantage of a departure is by demurrer. 2 Saund. 84 d.]

¶ In *assumpsit* the plaintiffs, as executors, declared on several promises alleged to have been made to their testator in his lifetime; the defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs; the plaintiffs replied that within six years before the obtaining the original writ the letters testamentary *were granted* to them, whereby the action accrued *to them*, the plaintiffs, within six years: the court held this a departure; as in the declaration they had laid promises to the testator, but in the replication alleged the right of action to accrue to themselves as executors. They ought to have laid promises to themselves as executors in the declaration, if they meant to put their action on this ground.

Willes, 27.]

To an information exhibited against the defendant, for not taking upon him the office of sheriff of Norwich, the defendant pleaded the statute of 13 Car. 2, (st. 2, c. 1, § 12,) by which it is enacted, that a person elected into any office in a corporation shall be such as within one year before hath taken the sacrament according to the Church of England, else the election shall be void, and averred that he had not taken the sacrament, &c., at any time within one year next before the election of him to be sheriff, &c., wherefore the election was void: the attorney-general replied, and set forth that part of the act of uniformity, by which every person is obliged to take the sacrament three times a year according to the liturgy, &c. The defendant rejoined, and set forth the act of parliament for tolerating dissenters; to which there was a demurrer; and it was held, that the defendant's rejoinder was a departure from his plea.

Carth. 306, *The King v. Larwood*; Ld. Raym. 29; 4 Mod. 269; Salk. 167, pl. 1; Skin. 574.

In debt upon a bond, conditioned to indemnify the plaintiff from all tonnage of certain coals bought of the defendant, due to W B, the defendant pleaded *non damnificat.*; to which the plaintiff replied, that for 5*l.* for tonnage of coals bought of the defendant the day of the date of the bond his barge was distrained, and that the defendant had not paid the said 5*l.*: the defendant rejoined, that no tonnage was due for the coals; to which the plaintiff demurred, supposing the rejoinder to be a departure from the plea; for the defendant having pleaded generally that the plaintiff was not damaged, and the plaintiff having assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach, which ought to have been done at first, and not after a general plea of indemnity; for rejoinders, it was insisted, should strengthen the bar, whereas this is a plain retraction of the plea, that denying the plaintiff has suffered any damage, this confessing and excusing it. On the other side it was insisted, that it was necessary for the defendant to set out all his case at first, and it suffices that his

## (L) Departure in Pleading.

bar is supported and strengthened by his rejoinder, which it was urged had been done in this case ; for the plea being only to enforce the plaintiff to assign a breach, the defendant may come afterwards and show the breach assigned is not within the meaning of the condition ; as, here, the condition is to save the plaintiff harmless from all tonnage due to W B, plaintiff replies, his barge was distrained for tonnage, but does not aver it was due ; then the defendant rejoins, there was no tonnage due, which being confessed by the demurrer, it is certain the plaintiff could not be prejudiced within the tenour of the condition, by which the defendant is obliged only to indemnify the plaintiff against such tonnage, so the plea is directly confirmed by the rejoinder ; and of this opinion was the court. Another point was made in this case by defendant's counsel, viz., admitting there was a departure, yet if the plaintiff has assigned, for a breach of the condition, what is really no breach, whereby it appears he has no cause of action, judgment shall be entered for the defendant ; as, in this case, plaintiff has instanced a distress of his barge for tonnage of coals bought of the defendant the day of the date of the bond, and has not ascertained what the coals were, so that they do not appear to be the same coals as are mentioned in the condition, which the court cannot intend, though they are said to be bought upon the day of the date of the condition ; for he might buy other coals for what appears to the contrary ; and of this opinion also was the court.

Mich. 6 G. 2, in C. B., *Owen v. Reynolds*. See 2 Barnard. K. B. 193.

After a plea of no award, a rejoinder confessing and avoiding the award is a departure.

*Munro v. Allaire*, 2 Cain. R. 320. See *Barlow v. Todd*, 3 Johns. 367.

To an action of *assumpsit* for goods sold, the defendant pleaded that the goods were exported from the United States to Canada during the war with Great Britain, and there sold to the defendant ; the plaintiff replied that they were exported from the United States before the war ; the defendant rejoined that they were exported in violation of the embargo law : held, that this was a departure from the plea.

*Sterns v. Patterson*, 14 Johns. 132.

After a plea of performance, a rejoinder in excuse for non-performance is a departure.

*Warren v. Powers*, 5 Conn. 373.

The replication of a new promise to a plea of the statute of limitations, is not a departure.

*Lord v. Shaler*, 3 Conn. 131.

To a declaration which averred a physical total loss of a ship, the defendant pleaded a survey at Cadiz, the port of destination ; replication, another survey at Cadiz, and traversing the survey in the plea ; held, a departure, for as the ship arrived at her port of destination, there could not be a physical total loss.

*Griswold v. Nat. Ins. Co.*, 3 Cowen, 96.

The declaration avers a delivery, &c. ; the plea states that the plaintiff did not deliver, &c. ; replication that the plaintiff tendered and the defendant refused : held, that the replication is departure from the declaration.

*Pollard v. Taylor*, 2 Bibb, 234.

## (M) Repleader.

If the plaintiff assign one breach in his declaration, and a different breach in his replication, this is a departure.

Henry v. Stiers, 2 Halst. 364.

## (M) Repleader: And herein,

1. *Of the Nature of a Repleader, and Manner of awarding it.*

WHEN issue is joined on an immaterial point, or such a point as after trial thereof the court cannot give judgment, as being impertinent or uncertain, and not determining the right, (a) the court regularly awards a repleader, or gives (b) judgment *quod partes replacent*; in which case the parties must begin again at the first fault which occasioned the immaterial issue. And herein it hath been held, that (c) if the declaration be ill, the bar ill, and the replication ill, the parties must begin *de novo*; but if the bar be good, and the replication ill, at the replication; and, if the bar and replication be both bad, and the repleader is awarded, it must be as to both.

23 H. 6, 18; Doct. pl. 311; 2 And. 6, 7, 24, 25; 4 Leon. 19; Skin. 570; 2 Lutw. 1622; [and see Stephen on Plead. 119.] [(a) Note: The materiality of these words, "not determining the right;" for if the court see that by the verdict, as found, substantial justice hath been done, or if they see that the party's case itself cannot be amended, or would be at all material, if put in any shape whatever, in neither of these cases shall there be a repleader. For in no case will a repleader be awarded, but where complete justice may be answered. Vide *Rex v. Philips*, 1 Burr. 293; *Rex v. Philips*, 1 Stra. 394; *Symmers v. Regem*, Cowp. 510; *Taylor v. Whitehead*, Dougl. 740;] {2 Johns. Rep. 387, *Havens v. Bush*.} (b) The judgment to replead was, *quia videtur curiæ quod placitum prædictum et exitum superinde junctum est minus sufficiens in lege, ideo dictum est partibus quod replacent*; and it was objected, that it was not any judgment, but that it ought to have been *ideo consideratum est, &c.* But the court held it a sufficient award to replead, and that this was the form agreeable to the course of the court. Cro. Ja. 6. (c) For this vide *Dyer*, 117; 5 E. 4, 108; 19 E. 4, 1; Doct. pl. 311; Dal. 17, pl. 8, 76, pl. 2; And. 31; Raym. 458; 3 Keb. 664; Ld. Raym. 707; Salk. 173, pl. 2, 216; 2 Salk. 579; 6 Mod. 2; Cowp. 510; {1 Wash. 135, *Smith v. Walker*; Ibid. 155, *Stevens v. Taliaferro*.}

If a repleader be denied where it should be granted, or granted where it should be denied, it is error.

2 Salk. 579; 6 Mod. 2.

Upon an issue joined in Chancery, on a *scire facias* upon a recognisance, the whole record was removed into B. R., and, after a trial had there, the judgment was arrested, by reason of misawarding the *venire*; and the parties being desirous to replead, the question was, Whether the repleader should be in Chancery or B. R.? And it was held by the judges of B. R. that it should be in that court.

Roll. Rep. 287, *Bishop of Bristol v. Sir Stephen Proctor*; Dallis. 15, pl. 6, like point. But I take it to be now the settled rule, not to suffer the Court of King's Bench to alter or amend any issue directed out of Chancery, but that for any irregularity herein application must be made to the Court of Chancery. Vide under tit. *Courts, Jurisdiction of the Court of Chancery*.

It is held, that there can be no costs to either party on a repleader, (d) because it is a judgment of the court upon the pleading, and therefore differs from an amendment, which cannot regularly be without payment of costs.

2 Vent. 196; 2 Salk. 579. (d) 6 Mod. 2.

[But since the practice of setting aside verdicts has prevailed, repleaders have been rarely granted, so that under the modern practice the courts can direct the costs to be paid by the party to whom the mistake in the pleadings is imputable.

1 Burr. 304.]

## (M) Repleader.

2. *A Repleader in what Cases to be awarded.*

Herein the general rule is, that if there be an immaterial issue, and thereupon a verdict, upon which the court cannot know for whom to give judgment, whether for the plaintiff or the defendant, a repleader is regularly to be awarded; for such immaterial issue is not aided after verdict by 32 H. 8, c. 30, or any of the statutes of jeofail; for, if what is material in the pleadings be not put in issue, it is not made necessary to be proved on the trial: or, if it be alleged and proved, yet, if it appear insufficient, so as not to be decisive between the parties, the verdict will be no good foundation for the judgment. But an (a) informal issue is helped by the verdict.

Cro. Eliz. 227; Doct. pl. 312; 2 Mod. 137, 140; Lev. 32. *2* The court will not award a repleader after a judgment on a material issue. Page v. Walker, 1 Tyl. 145. *g*—Where issue is joined upon a matter not triable. Raym. 458; Cro. Eliz. 131. *—*Where the time is immaterial, and yet made part of the issue. Latch, 92; 2 Saund. 318; 2 Lev. 12; Hard. 40. For an issue on an immaterial traverse. Moor, 693, pl. 959; Cro. Eliz. 456; Winch, 76; Cro. Eliz. 228; Gouls. 39, pl. 15; Savil, 78; 1 Saund. 22. (a) If the plea on which the issue is joined have no colourable pretence in it to bar the plaintiff, or if it be against an express rule in the law, there the issue is immaterial, and so as if there was no issue, and therefore it is not aided by the statute: but if it have the countenance of a legal plea, though it want necessary matter to make it sufficient, there shall be no repleader, because it is helped after verdict. Moor, 867, pl. 925; and vide Lev. 32; Carth. 371. *—*Diversity, where an issue is misjoined, and where there is no issue. 2 Roll. Rep. 187; Cro. Ja. 580; 2 Leon. 195; 3 Leon. 67; Godb. 56.

*2* When the pleadings are such that they will not bring out the proper facts, the court will direct a repleader or amendment, and this, although for the purpose of relying on the statute of limitations.

Coleson v. Blanton, 3 Hayw. 159. *g*

In trover against baron and feme upon a finding of the goods by the feme during coverture, and a conversion to her use, they pleaded *quod ipsi non sunt culpabiles*; which was held ill, because there was no tort supposed in the husband, and therefore a repleader was awarded, and the plea made *quod ipsa non est inde culpabilis*.

Cro. Ja. 5, Cox v. Cropwell.

If in debt upon an obligation by the sheriffs of London against J S, he pleads, that he being arrested by precept out of B. R., appeared at the day according to the condition of the bond, and thereupon issue is joined; in this case there shall be a repleader; for the appearance being entered of record, as it ought to be, the same is triable by the record, and not by a jury.

Owen, 53, House and Elkin v. Grindon, S. P. said to have been adjudged between Bret v. Shepherd, the same term. Leon. 90.

In trover for divers trees, the defendant pleads that Queen Mary was seised in fee of the manor of D, where those trees were growing, and that she granted it to the defendant in tail, whereby he was seised thereof, and that J S cut the said trees, and granted them to the plaintiff, who lost them, and the defendant found them, and converted them, &c.; the plaintiff replies, *de injuriâ suâ propriâ*, &c., and thereupon issue is joined: it was held, that pleading *de injuriâ suâ propriâ* was ill, where the defendant makes justification by claiming an interest in the freehold to himself; but that where one claims not any interest, but justifies by command or authority derived from another, it is otherwise; wherefore a repleader was awarded.

Cro. Eliz. 539, Archbishop of Canterbury v. Kemp.



## (M) Repleader.

In battery the baron justifies, for that the plaintiff assaulted his feme, in aid of whom, &c., the feme by herself pleads and justifies *de son assault d'emesme*; the plaintiff saith *de injuriâ suâ propriâ abeque tali causâ*; and both issues found for the plaintiff, and damages entirely given; and now alleged in arrest of judgment, that the trial was ill; for the feme by herself cannot plead, and the damages being entirely assessed, all was ill; and of that opinion was the court, and awarded that they should replead.

Cro. Ja. 239, *Watson v. Thorpe* and his wife.

If in debt upon a bond, conditioned for the payment of 60*l.* upon the 25th of June, the defendant pleads payment of the said 60*l.* upon the 20th day of June, *secundum formam et effectum conditionis*; and thereupon issue is joined and a verdict found that he did not pay the said 60*l.* upon the 20th of June; the plaintiff shall not have judgment, for the issue is taken *dehors* the matter of the condition, and so void: and it might not be paid the 20th, and yet might be paid the 25th; but it is held that if it had been found for the defendant, viz., that the money was paid the said 20th day, perhaps the verdict would have made it good.

Cro. Ja. 435, *Holmes v. Brockett*.

[A bond was conditioned for the payment of money *on or before* the 5th of December. Plea of payment on the 5th of December. Replication, issue, and verdict for the plaintiff. This was holden to be an immaterial issue, and a repleader was therefore awarded: though it would have been exclusive if found for the defendant; but did not conclude, when found for the plaintiff. And though this was a slip of the defendant, yet, as it did not determine the question, a repleader was awarded.

*Tryon v. Carter*, 2 Stra. 994; 1 Burr. 303. It was said by Buller, J., to be a rule, to which he could find no case of any exception, never to grant a repleader, when the issue found against the party tendering it. Dougl. 396.]

|| Where to an avowry for 120*l.* rent in arrear, the plaintiff pleaded in bar that the said 120*l.* was not due, and the defendant joined issue thereon, and at the trial it appeared that only 24*l.* was due; upon which the plaintiff objected that the evidence did not support the issue joined by the defendant; it was holden that the verdict for 24*l.* cured the informality in the issue.

*Cobb v. Bryan*, 3 Bos. & Pul. 348.]

In an action of debt upon a simple contract, payment was pleaded at A: plaintiff traverses, that the payment was at A: and a verdict, that the defendant did not pay at A. It was moved in a writ of error, that there ought to have been a repleader; otherwise, if the verdict had been found for the defendant: but the court affirmed the judgment.

Keb. 662, *Lucas v. Harlow*. *Qu.*

If in debt upon a single bill the defendant pleads payment without an acquittance, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though payment without an acquittance is no plea to a single bill, yet, because issue was joined upon an affirmative and a negative, and a verdict for the plaintiff, he shall have judgment.(a)

5 Co. 43, *Nichol's case*. (a) See the stat. 4 Ann. c. 16, § 12.

Debt for rent against lessee for years, defendant pleads, that before any rent due he assigned the term to another, of which plaintiff had notice; issue upon the notice, and verdict for the defendant, but no judgment was given,

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but a repleader awarded, in regard the issue was joined on a thing not material.

Lev. 32, *Serjeant v. Fairfax*.

In debt on a bond against the defendant as executor, issue was joined, whether the defendant had assets, or not, on the 30th day of November, which was the day on which he had the first notice of the plaintiff's original writ; and it was found for the defendant, that then he had not assets; and this being held an immaterial issue, (for though he had not assets then, yet, if he had any afterwards, he is liable to the plaintiff's action,) a repleader was awarded.

2 Mod. 129, *Read v. Dawson*.

If in debt upon an obligation, conditioned for the payment of 100*l.* upon the 31st day of September following, the defendant pleads payment the said 31st day according to the condition; and thereupon issue is joined, and found, that the money was not paid upon the said day, the plaintiff shall have judgment; for though the issue is upon an impossibility, there being no such day, yet the jury finding it not paid at the day, or at any time before, in effect find it was never paid, which is a good verdict.

Cro. Car. 78, *Purchase v. Jago*; Jon. 140; *Latch*. 148; *Noy*, 84, S. C.

Trespass for battery and false imprisonment such a day and place; the defendant justified at another day and place by virtue of a writ and warrant from the sheriff, *absque hoc*, that he is guilty *aliter*, *vel alio modo*, *vel* at any other place; the plaintiff replied, that he is guilty *aliter et alio modo*, and at another place; whereupon issue was joined, and verdict for the plaintiff; but for the badness and uncertainty of the issue, upon motion in arrest, judgment was stayed, and a repleader awarded.

2 Lev. 164, *Masters v. Wood*.

In *assumpsit* against an administratrix, the defendant pleaded *quod ipsa non assumpsit* instead of the intestate; and after verdict a repleader was awarded.

2 Vent. 196.

But, if on an issue tendered by the plaintiff the defendant joins the *similiter* by the plaintiff's name, or the plaintiff joins the *similiter* by the defendant's to an issue tendered by the defendant; this shall be amended, there being a negative and affirmative before between the plaintiff and defendant, which is the pattern from whence the joining of that issue is to be taken; and this being a plain mistake, as appears from the nature of the thing, of one man's name for another.

Roll. Abr. 200; *Yelv.* 65; *Cro. Ja.* 67, S. C.; and *Cro. Eliz.* 752; *Style*, 167; *Palm.* 524, L. P.

In an action upon a penal statute the defendant pleaded *non debet* to the informer *et de hoc ponit se super patriam*; and issue was joined *et prædict.* the informer *similiter*, without mentioning the king; and after a verdict for the plaintiff a repleader was awarded.(a)

Vent. 122, *Reynell v. Heal*; 2 Keb. 788, S. C. (a) *Qu.* As to the law in this case, the king not being a party to the suit, but the informer the only plaintiff, though he sue for the king and himself?

If the jury do not find assets to a certain value, the verdict is insufficient, and a repleader shall be granted, and the issue tried by another inquest.

40 E. 3, 15; *Doct.* pl. 313; 6 Mod. 3.

[[In debt on bond conditioned for performance of the covenants in an in-

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denture, the defendants pleaded performance of each covenant specially, and also a general performance of all the covenants in the indenture. The plaintiffs in their replication took issue on the general performance, and concluded to the country, and then proceeded to suggest three several breaches of covenant; and the defendants by their rejoinder joined issue on the replication. The court held that the plaintiffs should have assigned breaches in their replication, that the issue tried was immaterial, and consequently a repleader must be awarded.

*Plomer v. Ross*, 5 Taunt. 386.¶

¶ Although the issue may be immaterial, a repleader will not be awarded if it appear from the record, that if the plea had been properly pleaded, the decision of the issue must have been the same.

*Henderson v. Foote*, 3 Call, 248.

In a case of slander, the defendant pleaded the word "justification" only, the plaintiff filed a general replication, the verdict was for the defendant: a repleader was awarded.

*Kirtley v. Dick*, 3 Hen. & Munf. 388.

Defendant was sued as heir and devisee, and pleaded "that he had no assets by descent," the plaintiff took issue, and the verdict was for the defendant: a repleader was awarded.

*Baird v. Mattox*, 1 Call, 237.

In a writ of right, where no issue had been joined, a repleader was awarded.

*Taylor v. Huston*, 2 Hen. & Munf. 161.g

3. *Repleader, at what Time to be awarded.*

It seems that at common law a repleader was as well allowed before as after trial, because a verdict did not cure an immaterial issue; but (a) it seems to be now settled, that no repleader ought to be allowed before trial, because the fault of the issue may be helped by the trial by the statute of jeofails.

Salk. 579. (a) 3 Keb. 664; 6 Mod. 2, S. P., and that it is discretionary in the court, but not advisable, since the verdict may cure immaterial or informal issues. ¶ A verdict does not cure an *immaterial* issue by the statute of jeofails, 32 H. 8, c. 30, any more than it did at common law; it only cures an *informal* issue, (as to which see 2 Will. Saund. 319 a, b.) The reason, therefore, in the text, for not granting a repleader till after trial since the statute, is erroneous; and the learned editors of the last edition of Saunders, in a note vol. ii. 319 b, suggest as a reason for the change of practice, that before the statute, as the verdict could not have any effect upon the issue, a repleader might be awarded before trial, but that since the statute a verdict cures an informal issue, and therefore the court will not interfere until the result of a trial is seen, which may render a motion for a repleader unnecessary; but though this is a good reason for letting an *informal* issue go to trial before entertaining a motion for a repleader, it does not seem to be any reason for refusing a repleader before trial on an *immaterial* issue, which cannot be affected by the verdict.¶

It is held by a multitude of authorities, that after a demurrer the repleader is not to be admitted, because by the demurrer the parties have put themselves on the judgment of the court.

5 Co. 52, Ridgeway's case; Doct. pl. 311; Poph. 49; Savil, 89; Latch. 148; Leon. 79; Moor, 461, pl. 644, 867, pl. 925; Roll. R. 271; And. 168; Lev. 142; 6 Mod. 102.—But in 3 Lev. 20, there is an instance of a repleader after a demurrer; and in 3 Lev. 440, it is said, that there was a repleader after demurrer and solemn argument; but these cases have of late been denied to be law.

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It is said to have been usual in ancient times to award a repleader upon a writ of error in B. R., but it seems to be now agreed, that there can be no repleader upon a writ of error.

2 Sand. 319; 2 Lev. 12; 2 Keb. 789; 6 Mod. 102.

It is held, that no repleader can be awarded after a default.

2 Salk. 579; 6 Mod. 3. No repleader after a discontinuance. Comb. 323; Ld. Raym. 30; Salk. 219, pl. 4.

## (N) Demurrer: And herein,

1. *The Definition and Nature of a Demurrer.*

A DEMURRER(a) in pleading(b) is an admission by the party of the fact charged in the count or declaration, plea, replication, &c.,(c) and refers the law arising on such fact to the judgment of the court.

Doct. pl. 115; Finch, c. 40. (a) Comes, says my Lord Coke, from the Latin word *demorari*, to abide in law. Co. Lit. 71 b. (b) As there may be a demurrer upon counts and pleas, so there may be of aid prior, voucher, receipt, waging of law and the like. Co. Lit. 72 a.—For demurring on evidence, vide *infra*. (c) May be taken to the rejoinder, &c., and to a special as well as a general plea; for all parts of pleading to issue ought to be according to the rules of law; and if any part fail, the whole is naught, and may therefore be demurred unto. Co. Lit. 72 a; Lil. Reg. 435.

It is termed in some books an issue in law, and therefore in a declaration, plea, &c., there may be two independent issues, viz.: a demurrer, which is the issue in law, determined by the court; and an issue in fact, determinable by the jury. But this must be understood as to distinct parts of the same declaration, plea, &c., for it is never allowed the defendant to plead and demur to the same fact, this being a duplicity that would draw the matter to different judicatures, and would be vexatious and expensive, were it admitted; for in such case the party would demur specially to form, and if he was overruled there then he would deny the fact.

Co. Lit. 71, 72; Doct. pl. 115; Lil. Reg. 438; 5 Co. 104; Dyer, 21 a, 87 b. *By* act of Assembly, in Virginia the defendant may plead and demur at the same time. *Fowle v. The Common Council of Alexandria*, 3 Pet. 409.*g*

So, on the statute 4 & 5 Ann. c. 16, which enables defendants by leave of the court to plead several pleas, &c., it hath been refused to allow a defendant to plead and demur to the same declaration; for a demurrer is so far from being a plea, that it is an excuse for not pleading; and it would be absurd for the party to plead, and at the same time pray that he might not plead.(d)

Cases in Law and Eq. 280, *Halson v. Jefferies*. (d) But the defendant may demur to one count, and plead to another, for separate counts are as several declarations. [And when there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally to the whole declaration, the court would give judgment against him. 1 Saund. 286; 2 Saund. 380; 1 Wils. 248; 4 Bos. & Pul. 43, *Judin v. Samuel*; 6 East, 333, S. C.; 3 Cain. 89, *Whitney v. Crosby*; *Ibid.* 263, *Ward v. Sackrider*; 1 Hen. & Mun. 361, *Roe v. Crutchfield*.] But if a plea or replication, which is entire, be bad in part, it is bad for the whole. 2 Saund. 124; 1 Salk. 312; 1 Term R. 40; 3 Term R. 374.]

If there be a demurrer to part, and an issue for part, the more orderly course is to give judgment upon the demurrer first; but yet it is in the discretion of the court to try the issue first if they will.

Co. Lit. 72 a, 125 b; Doct. pl. 116; Palm. 517, S. P., because the jury can then assess the damages on the whole. [In practice, it is usual and advisable to determine the issue in law first, for the following reasons: first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in

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fact; secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact; and lastly, that whether the demurrer goes to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the court should be of opinion against him, he may amend, as at common law; but, after the cause has been carried down to trial, he cannot amend any further than is allowable by the statutes of amendment. Tidd's Prac. (7th ed.) 775. ¶ Although the plaintiff in ordinary cases has a right to marshal his own proceedings, provided he conforms to the rules of the court, yet if the court see that the ends of justice will be better answered by first determining the question of law on the demurrer, they will postpone the trial of the issue in fact. 13 East, 41, 47.]

If there be a demurrer to part, and an issue upon other part, and judgment be given for the plaintiff upon the demurrer, he may enter a *non pros.* as to the issue, and proceed to a writ of inquiry on the demurrer; but without a *non pros.* he cannot have a writ of inquiry, because on the trial of the issue the same jury will ascertain the damages for that part to which the demurrer was.

Salk. 219, pl. 6, *per cur.*

β A demurrer admits facts well pleaded, with a view to a determination of their legal sufficiency; but it is strictly confined to this office, and cannot be used as an instrument of evidence or an issue in fact.

Pease v. Phelps, 10 Conn. 62.g

2. *The Manner and Form of Demurring; and therein, of joining in Demurrer, and waiving thereof.*

The words of a demurrer, when to the declaration, are *quia narratio, &c., materioque in eadem contenta minus sufficiens in lege existit, &c.*; and to a plea are *quia placitum, &c., materioque in eodem contenta minus sufficiens in lege existit, &c., unde pro defectu sufficientis narrationis sive placiti, &c., petit judicium, &c.*; to which the adverse party replies, *quod narratio, or placitum prædictum, &c., materioque in eodem contenta bon. et sufficiens in lege existunt, &c., et petit judicium*, and thereupon the demurrer is said to be joined.

Co. Lit. 7 b; Yelv. 5, 6. Where the substantial part of the demurrer was in, though ill in form, the court held, is a demurrer. Vide 5 Mod. 139. β When objections merely formal are stated specifically as causes of demurrer, the party taking them is entitled to the benefit of the exceptions, when well founded. Lockington v. Smith, 1 Pet. C. C. R. 475.g

In some cases a man shall allege special matter, and conclude with a demurrer: as, in an action of trespass brought by J S for the taking of his horse, the defendant pleads, that he himself was possessed of the horse until he was by one J S dispossessed, who gave him to the plaintiff, &c.; the plaintiff saith that J S named in the bar, and J S the plaintiff, are all one person and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law; and the court held the plea and demurrer good, and that without the matter thus alleged he could not demur.

Co. Lit. 72 b.

In a *quare impedit* the patron pleaded one plea in bar, and the incumbent the same plea by himself; the Queen demurred thus, *Quoad separatia placita per def. separatim placita. dicta domina regina necesse non habet nec per legem terræ tenetur respondere: et per. cur.*; the demurrer ought to have been several on each plea by itself.

Leon. 139, The Queen v. Archbishop of Canterbury and others.

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If a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement; for, if the matter of abatement be extrinsic, the defendant must plead it; if intrinsic, the court will take notice of it themselves.

Salk. 220, pl. 7, *Doceminique v. Davenant*. Vide 2 Hawk. P. C. c. 32.

After the plaintiff and defendant have joined in the issue, which is to be tried betwixt them, neither of them (a) can demur without the consent of the other; for by joining in the issue they have admitted the pleadings to be good, and sufficient to try the issue.

Show. 213; Lil. Reg. 437. (a) A demurrer to an appeal hath been received after issue joined. Cro. Eliz. 196.—But it hath been adjudged, that a demurrer to an indictment ought not to be received after verdict. Sid. 208. β After a demurrer has been argued and overruled, the court will not permit it to be withdrawn in a case where they are of opinion that the party demurring could not plead successfully. *Broadwell v. Denman*, 2 Halst. 278.g

So, it hath been resolved, that after a demurrer there cannot be a repleader; for the parties, by their mutual consent, having put themselves on the judgment of the court, cannot without leave of the court replead.

Cro. Eliz. 62, 318; 3 Co. 52 b.

There cannot be (b) a demurrer to a demurrer; and if there be, it makes a discontinuance, for there is no difference between pleading over when issue is offered, and not joining in demurrer, but pleading over; both are alike, and make a discontinuance.

Salk. 219, pl. 4; Ld. Raym. 20. (a) It is said, that one may demur to a demurrer for the doubleness of it, for a demurrer ought to have formality and certainty in it to avoid barbarism, and inveigling of the court; but, if one that might demur do not demur to it, but join in the demurrer, he cannot demur afterwards, for he hath slipped his advantage. Lil. Reg. 438.—And in case of a demurrer to a plea in abatement, it is said, one may demur upon that demurrer. But *per* Holt, C. J., that is where the demurrer is not apposite; but, if the demurrer be proper and apposite, you must join. Comb. 306.

It is said, that these are the same rules for joining in demurrer as there are in pleading; and that in criminal cases, not capital, the course is to allow the party four days to join in demurrer; but it hath been held, that in capital cases the party must join in demurrer *instantly*.

Skin. 217, pl. 1. Vide *Layer's trial*, *State Trials*, vol. 6, 229; {and 6 East, 587, 588, *The King v. Johnston*.}

If demurrer be entered, it cannot be waived, except both the plaintiff and defendant consent unto it, nor then without leave of the court; because by the demurrer both parties have submitted the matters in law in question betwixt them to the judgment of the court.

Cro. Car. 513; Jenk. 128; 5 Mod. 18.

A demurrer is not to be allowed unless it be signed by counsel.

Lil. Reg. 436. But a demurrer upon a challenge to a jury is good without a counsel's or serjeant's hand; and as soon as it is agreed on at the bar, the same is to be entered up without further circumstances. 3 Leon. 222.

β The court will not notice any informality unless pointed out by the demurrer.

*Snyder v. Croy*, 2 Johns. 428; 2 Mass. 283.g

3. *What Facts are admitted by a Demurrer.*

It is laid down as a general uncontested rule, that a demurrer admits all such matters of fact as are sufficiently pleaded.

Co. Lit. 79 a; Dyer, 21; 5 Co. 69; Doct. pl. 119; Hob. 81; Sand. 353; Carth.

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31; [Com. Dig. *Pleader*, (Q 5;) 1 East, 634; 1 Term R. 334.]  $\beta$  A demurrer to the defendant's plea generally is a waiver to any exception to the plea, on the ground of a misnomer of the defendant in it. *Hutchinson v. Brook*, 11 Mass. 119. $\gamma$

And therefore if in waste the defendant demurs to the declaration, and it is adjudged against him, there shall issue no writ of waste, this being admitted by the demurrer; but a writ shall issue to inquire of the damages.

34 H. 6, 5; Doct. pl. 117.

But matters not sufficiently pleaded are not admitted by a demurrer: so in a demurrer upon a matter in law, says my Lord Hobart, though the parties will join upon some one point, upon which, if it stood alone, judgment should be given for the one party, yet, if upon the whole record matter in law appears why judgment should be given against the said party, the court must determine so; for it is the office of the court to determine the law upon the whole record, and the consent of parties cannot prejudice their opinions, nor discharge them of their office in that point.

Hob. 56.

If in covenant divers breaches are assigned, some of which are good and others ill, and the defendant demurs to the whole declaration, the plaintiff shall have judgment for (a) those which are well assigned, and for the others shall be barred.

2 Sand. 379, 380. (a) In trover for several things, and among the rest *de duobus fulcris*, the defendant demurred, and Holt, C. J., refused to give judgment *quod nil capiat*, saying the plaintiff may take several damages, and release as to this, and then take judgment as to the rest, and all would be well. Salk. 218, pl. 1.

|| But where there are several counts, and some are good and others bad, the defendant should only demur to the latter; for if he demur to the whole declaration judgment will be given against him, for the court cannot give judgment that the demurrer is in part good.

1 Saund. 286, (9); 1 New R. 43.]

So, if the sum demanded by a declaration in *scire facias* be divisible on the record, and there be no objection to one part of it, a demurrer which goes to the whole is bad.

Powdick v. Lyon, 11 East, 568.

If a plea or replication, which is entire, be bad in part, it is bad for the whole.

1 Saund. 28, (2.)

But a plea of set-off wherein the demands are divisible, and in nature of several counts in a declaration, forms an exception to this rule.

2 Black. R. 910.]

$\beta$  Debt by the postmaster-general against a deputy postmaster and his sureties on the official bond, the sureties pleaded that the plaintiff did not call upon the principal for a settlement of accounts, but fraudulently, &c., neglected to give notice, &c. The plaintiff demurred generally; held, that the charge in the plea was thereby admitted, and judgment was given for the defendants.

The Postmaster-general v. Ustick, 4 Wash. C. C. R. 347. $\gamma$

## 4. How far a Judgment on a Demurrer is peremptory.

It seems to be agreed as a general rule, that a judgment (b) on a demurrer is as conclusive and binding as if the same had been after a verdict, &c.

(b) So, where a statute enacts, that a person convicted of such an offence shall forfeit

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as and so, a conviction on a demurrer hath been held sufficient. 11 Co. 58; Reil. R. 69. & When the whole pleadings are opened upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. United States v. Gurney, 4 Conn. 333; *Cashe v. Gorman's adm'r*, 3 Conn. 229; *United States v. Archer*, 5 Conn. 257.<sup>g</sup>

But upon a plea to the jurisdiction, person, writ, and prior, view, estate, & voucher, and demurrer joined upon such plea or prayer, and ruled against him who demurs, there is only judgment to answer over.

Jenk. 396; [G. H. C. P. 53; 1 Ld. Raym. 351; Say R. 46; 2 Wils. 368;] 1 East, 561.] (s. Dyer. 69. p. 35. 341. p. 5.—) If after a demurrer a person shall have the advantage of his age, *quare* 3 H. 6. 46; Dant. p. 116.

[But in other cases, the judgment is interlocutory or final, according to the nature of the action: if the action be for damages, in *assumpsit*, &c., it is interlocutory, and should be signed, on treblepeny stamped paper, with the judgments, after which the damages should be assessed, on a writ of inquiry, or reference to the Master: but in debt, &c., for a sum certain, the judgment is final, and there being no necessity for a rule for judgment, & the plaintiff may immediately tax his costs, and take out execution.

Tind's Pl. 479, 479. (1) 1 Str. 425.]

It seems to be the better opinion, that a general demurrer, concluding in bar of an appeal or indictment, or a demurrer to a plea in bar which admits the fact, or to a replication to such a plea, is peremptory and conclusive: so that if the indictment be good, judgment and execution shall go against the prisoner.

Vine 2 Hawk. P. C. c. 32.

But it hath been adjudged, that if an appellee demur in law to an appeal by reason of the insufficiency of the declaration, or generally demur to the declaration, with a conclusion *et petit judicium de narratione illâ, et quod narratio illa cassetur*, &c., such demurrer shall not conclude him from pleading over to the felony, either at the same time with the demurrer, or after it shall be adjudged against him.

Dyer. 36; Cro. Eliz. 196.

But in criminal cases, not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment; for it seems, that in such cases there can be no demurrer properly in abatement, except it be to a plea in abatement, or to a replication to such a plea.

Cro. Eliz. 196; Rast. Ent. 160.

& When a party demurs to a defective pleading, if the previous pleading be also defective, judgment must be against the demurrer.

Geiston v. Barr, 11 Johns. 482.

When on a demurrer to a plea in bar, the judgment is in favour of the plaintiff, it should be a judgment *quod recuperet*, and not *quod respondeat oster*; but should the latter judgment be given, the defendant cannot take advantage of it on error, for it is in his favour.

Bauer v. Roth, 4 Rawle, 83.

When the defendant pleaded two pleas in bar, to one of which there was a demurrer, and issue was joined upon the other, under which the cause was tried and a verdict passed for the plaintiff, upon which the court below passed judgment; held, that notwithstanding this verdict and judgment, the Supreme Court might give judgment for the defendant on the demurrer.

Willard v. Morris, 1 Penns. R. 490.<sup>g</sup>



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5. *Of the Difference between a general and special Demurrer.*

A demurrer is said to be general or special: (a) general, where no particular cause is alleged; special, where the particular thing objected to is pointed out, and insisted upon as the cause of demurrer. And herein it is said, (b) that as a general demurrer confesseth all such matters of fact as are sufficiently pleaded, so he that demurs specially can take no advantage of any other matter of form than what he hath expressed in his demurrer; but he may of any other matter of substance.

Co. Lit. 72 a. (a) The words of a general demurrer are, *quod breve, vel narratio, vel placitum, &c., materiaque in eodem content. minus sufficien. in lege exist., &c.*—A demurrer, because *incerta et caret forma*, is a general demurrer. Show. 242; Comb. 297. (b) 10 Co. 88.  $\beta$  A departure in pleading may be taken advantage of on general demurrer. Keay v. Goodwin, 16 Mass. 1.

And herein it is said, that the ancient practice was, to demur specially; and that the way was, when the pleadings were drawn at the bar, to make the exception immediately, and the other party might mend if he pleased, or might demur if he durst venture it; and Hale says, that though now they are put in paper, yet such a course should be observed, that persons may not be caught by demurrers contrary to the original intention of them.

Vent. 240.—Good rule to be observed in demurrers, always to show the cause of demurrer. 2 Bulst. 267, per Coke.

But, as the law requires regularity in the proceeding, and that all parts of pleading should be according to approved precedents, it seems an established rule, not to admit the party to amend after a demurrer entered of record; though it hath been held, that if the plaintiff declares and the defendant pleads, and the plaintiff replies and the defendant demurs, and the plaintiff joins in demurrer, yet the plaintiff may move to amend on payment of costs, if the cause be still in paper. [Indeed, the very intent of requiring mistakes, in point of law, to be shown for cause of demurrer, was, to give the party an opportunity of amending. And even where the proceedings are entered on record, and the demurrer has been argued, the court will give leave to amend, where the justice of the case requires it, and there is any thing to amend by. The court, however, will always take care, that if one party obtain leave to amend, the other party shall not be prejudiced or delayed thereby.] So, a party may withdraw a demurrer not entered of record, and move to amend.

Yelv. 38; Cro. Ja. 13; Bulst. 204; 2 Vent. 142; 3 Lev. 39; 6 Mod. 263; 3 Mod. 235; 2 Salk. 520; Gilb. C. P. 114, 115; 2 Str. 846; 1 Barnard. K. B. 213, 220; 2 Saund. 402; 2 Str. 735, 954, 976; Ca. temp. Hardw. 43; 1 Burr. 321; Dougl. 330; Barnes, 9, 21, 25; 2 Burr. 756.

[And leave hath been sometimes given to a party to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits. Thus, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to show cause, why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shown, was afterwards made absolute. But this is altogether discretionary in the court. Therefore, where to an action of debt on a bail-bond the defendant pleaded there was no bill of Middlesex, and the plaintiff demurred, the court, after delivering their opinion in favour of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend: And by Wright, J.—It is not usual to amend after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave

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in the present case, it being an action against bail, whom the court is always inclined to favour.—So, where the defendant rejoined to several replications in trespass, and demurred to others, and a verdict was found for him upon the issues in fact, and contingent damages were assessed upon the demurrers, which were afterwards overruled, the court refused to let the defendant withdraw his demurrers and plead to issue: And by Dennison, J.—Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddins v. Giddins*, (Say. Rep. 316.) But this is an attempt to amend issues in law, after a verdict has been found on the issues in fact, and contingent damages assessed, of which there never was an instance. And we do not know where it would end, nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: here are verdicts, and contingent damages, found. The cases of amendment cited are, where the whole is supposed to be in paper: else the court could not have done it. We have no authority to do this, after it is plainly upon record.

Tidd's Pr. 450; Dougl. 385, 452; *Robinson v. Rayley*, 1 Burr. 331;] [1 *Kanyon*, 335, S. C.; and see 2 Chitt. R. 5; Tidd, 710, (9th ed.)]

¶ After the court had given their opinion on the argument, an amendment was denied.

1 East, 391; and see *Barnes*, 9; 1 H. Black. 37; 2 Bos. & Pul. 402; 3 Ibid. 11, 19; 5 Taunt. 765; 6 Ibid. 248; 1 Marsh. 567; but see 1 East, 379, where the amendment was allowed in case of a replication to a *sham* plea.]

Also, where a person hath good cause of demurrer at the time of his demurring, no act of the other party afterwards will make it naught; as if, in debt for rent, the plaintiff declares for more than appears by his own showing to be due to him, and for which the defendant demurs, the plaintiff cannot afterwards enter a *remittitur* for the overplus; for by this means the defendant, by relying on his demurrer, might be tricked in his defence.

Sand. 285, *Duppa v. Mayo*.

¶ A plea which professes to be a bar of the whole demand, but is a bar only to a part, is bad on special demurrer.

*Postmaster-general v. Reeder*, 4 Wash. C. C. R. 678.

In a special demurrer to a plea, it is not sufficient to object in general terms that the plea is "uncertain, defective, or informal," the demurrer must show in what respects it is so.

*Mercer v. Watson*, 1 Watts, 346.

It is not sufficient cause of demurrer to a special plea, that the facts set forth in it may be given in evidence under the general issue.

*Baser v. Roth*, 4 Rawle, 83.*g*

But, for the better understanding the difference between a general and special demurrer, we shall briefly consider

#### 6. *What Things are good on a general Demurrer, that would be otherwise on a special one.*

Herein the established distinction is, that matters of substance, that is, the omission of such material things as are necessary to show a right in the plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer; but matters of form merely must be specially alleged, and assigned as causes of demurrer. For the law, says my Lord Hobart, (a) requires in pleading two things: 1st, That it be in matter sufficient; 2dly, That it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting it is cause of

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demurrer, with this distinction, which seems to be founded on the common law, and is fully explained and confirmed by the statutes 27 Eliz. c. 5, and 4 Ann. c. 16.

For this distinction, vide 10 Co. 88, Dr. Leyfield's case; Doct. pl. 118; Style, 41; Latch, 185; Roll. R. 112; Co. Lit. 72 a; Hob. 127, 164; Hutt. 13; Savil, 78, 87; Palm. 368; Leon. 44; 2 Roll. R. 306; Sid. 306; Sand. 9, 31, 98, 337; 2 Sand. 190; 5 Mod. 18; Carth. 66, 88; Salk. 291, pl. 5.  $\beta$  A departure in pleading is matter of substance, and may be taken advantage of on general demurrer. *Sterns v. Patterson*, 14 Johns. 132.  $\gamma$  (a) Hob. 232; 2 Ld. Raym. 798; 7 Mod. 71; 2 Salk. 678, pl. 5.

$\beta$  Duplicity in pleading can be taken advantage of only on special demurrer.

*Smith v. Northrop*, 1 Root, 387.  $\beta$

By the 27 Eliz. c. 5, § 1, reciting, "That excessive charges and expenses, and great delay and hinderance of justice hath grown in actions and suits between the subjects of this realm, by reason that, upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law, given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else, after long time, and great trouble and expenses, to renew again their suits; for remedy whereof it is enacted, that after demurrer joined, and entered in an action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer; and that no judgment to be given shall be reversed by any writ of error for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted."

And by § 2, it is further enacted, "That after demurrer joined and entered, the court where the same shall be, shall and may, by virtue of this act, from time to time amend all and every such imperfections, defects, and wants of form, as is before mentioned, other than those only which the party demurring shall specially and particularly express and set down, together with his demurrer, as is aforesaid."

There is a proviso in this act, that it shall not extend to criminal proceedings.

It hath been frequently adjudged, that if a plea be double, no advantage can be taken thereof on a general demurrer; but the party must show (a) specially in what the doubleness consists, being only matter of form, and clearly within the above mentioned statute of 27 Eliz. c. 5.

Co. Lit. 72; Roll. R. 112; Lutw. 4. (a) In demurrer for duplicity, it is not sufficient to demur *quia duplex est*, or *duplicem habet materiam*, but the party must show wherein; for the statute, by requiring to show cause, intended to oblige the party to lay his finger upon the very point. Salk. 219, pl. 5; 2 Ld. Raym. 798; 7 Mod. 71; 2 Salk. 678, pl. 5, *per Holt, C. J.*

As, in debt upon an obligation for performance of articles, which was to pay so much at two days in certain, the defendant said he paid accordingly, the plaintiff replied that he had not, this was held a double plea, because it went to both days, yet aided on a general demurrer.

Roll. R. 112, *Saunders v. Crawley*.

So, if the defendant pleads a plea which amounts to the general issue,

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this is but matter of form, and must be taken advantage of on a special demurrer: also, at common law, if a defendant had pleaded a plea, which amounted to the general issue, and the plaintiff had demurred thereupon; if the defendant had refused to plead the general issue, but instead thereof joined in demurrer, the court determined it against him.

10 Co. 94 a; Doct. pl. 116; Hob. 127; Jenk. 306.

Also, it is held, that if a special matter is pleaded, which looks like the colour of a plea, but amounts to the general issue, it is no cause of demurrer; as, if in debt you plead a release, though you might have given it in evidence on *nil debet*, yet it is no cause of demurrer; so, in debt for rent, if you plead entry and expulsion, it is no cause of demurrer, though it may be given in evidence on *nil debet*.

5 Mod. 18.

But, where an act of parliament gives the party privilege to plead the general issue, and he plead specially, if such special plea be faulty the plaintiff may demur to it; for though he needed not to have pleaded specially, yet having done so, his plea must be agreeable to the rules of law.

Lil. Reg. 436.

There must be a special demurrer to a negative pregnant, that is, a negative plea, which doth also contain in it an affirmative: so to an argumentative plea, that is, a plea which concludes nothing directly, but only by way of argument or reasoning: for the court will intend every plea to be good till the contrary doth appear.

Lil. Reg. 437.

In debt upon an obligation to perform covenants, the defendant pleaded generally performance of covenants, where some were in the negative, and some in the affirmative; and this was held to be but matter of form, and aided by the statute 27 Eliz. c. 5, except the party sheweth for cause of his demurrer, that some of the covenants are in the negative, and some in the affirmative, for the court shall adjudge according to the truth of the matter: but if any of the covenants are in the disjunctive it is otherwise, for the court cannot know which of them in the disjunctive he hath performed.

Cro. Eliz. Oglethorp v. Hyde; and vide Hob. 13; Moor, 856; Co. Lit. 303.

In debt upon a bond for performance of covenants in an indenture of apprenticeship, several breaches were assigned, and the defendant demurred generally; and *per* Holt, C. J., you could not take advantage of the assignment of several breaches even at common law, without showing it for cause; and though in this case there were the words *incerta et caret forma*, yet it was held but a general demurrer, and therefore ill.

Comb. 297, Gibbe v. Cope.

But though matters of form are aided upon a general demurrer, yet there must be sufficient appear to the court to ground their judgments upon; and it is not enough that the party hath right, but such right must be disclosed to the judges in the record so as to enable them to pronounce upon it.

Hob. 233.

And therefore it hath been held, that if an executor or administrator brought an action of debt, and did not produce their probate or administration, that this was not aided.

Nich. 222. But this is now aided by the express words of 4 & 5 Ann. c. 16, which reads, *vide* Amendment, letter (B).

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So if a man plead a conveyance of a rent, or the like, that cannot pass without deed, without (a) producing the deed in his plea, it is not aided; for it is not enough for the party to say that he is executor, or that the rent was granted to him, but the court must see and judge of it, else the right appears not; and the adverse party may cause the deed to be enrolled, which makes it a part of the plea, whereupon the court shall judge whether it maintain the plea or not.

Hob. 233; 10 Co. 88; Cro. Ja. 172, 613. (a) That the omission of *profert in cur.* the deed pleaded is only matter of form, which the party demurring cannot take advantage of upon a general demurrer, and that when oyer of the deed is demanded, it is presumed that the deed is in court, and that *ei legitur*; the reading is the act of the court. Sid. 308.

So if the means be wanting whereby the right shall be made to appear, it is incurable: as if a man bring an action of debt upon an obligation and produce it, but say it was made beyond sea, or do not allege a place (b) where it was made, a general demurrer serves; and for the same reason two affirmatives without a traverse is not aided, because it admits no trial, without which the court cannot see the right.

Hob. 233. (b) Supposing a bond made in and dated at Fort St. George, in the East Indies, it is usual to allege it made there, under a *scilicet* at Westminster, or wherever the *venue* is laid.

So if in debt upon an obligation, conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff replies and shows the award, he must also show the breach, without which he hath no cause of action, or it is ill on a general demurrer; for though the defendant can make no answer to the breach, yet it ought to appear to the court that the plaintiff hath cause of action.

Hob. 233; Yelv. 152; Cro. Ja. 220; Saund. 102.

But if debt on an obligation conditioned for the performance of an award, so as, &c., the defendant pleads no award made, and the defendant replies, that *ante exhibitionem billæ, scilicet* the 24th of June, (which was a day within the submission,) the arbitrators made an award, &c., and the defendant demurs generally, the plaintiff shall have judgment; for though the plaintiff ought to have replied that the arbitrators made their award before the day limited to them, yet this is form only, and helped on a general demurrer.

Sid. 370.

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff sets forth an award with *profert in cur.* and the defendant craves *oyer*, and then demurs for variance between the award set out in the replication and the *oyer*, and the variances appear material, the defendant must have judgment; otherwise, if the variance had been as to those parts in which the award was void.

Salk. 72, pl. 9, Foreland v. Marygold.

It hath been held, that a declaration in trespass not concluding *contra pacem domini regis* was ill on a general demurrer; but this is now helped by the forementioned statute 4 & 5 Ann. c. 16, which enacts, "That no advantage or exception shall be taken of or for an immaterial traverse, or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration, or other pleading, or of or for the default of alleging of the bringing into court letters testamentary or letters of administration, or of or for the admission of *vi et*

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*armis et contra pacem*, or either of them, or of or for the want of averment of *hoc paratus est verificare per recordum*, or of or for not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer."

Carth. 66, *cont.*; Sid. 253.

||The omission of a venue in stating a request to do an act in a declaration is matter of form, and only available on special demurrer under this statute.

10 East, 359. And for some other examples where a special demurrer is necessary, and where a general demurrer is held sufficient, see 10 East, 139; 2 H. Bl. 259; 5 Term R. 409.||

## 7. Demurrer to Evidence.

A Demurrer to evidence is a course of practice, generally speaking, not calculated to promote the ends of justice; if the objection to the sufficiency of the evidence is made by way of motion for a nonsuit, it might be removed by the immediate testimony within the command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make inquiries, which the witness examined would probably answer.

United States Bank v. Smith, 11 Wheat. 180.

But according to Chief Justice Gibson, there is perhaps more reason why the use of demurrers to evidence should be retained and encouraged in Pennsylvania, than in England, inasmuch as the opinion of the court of the last resort cannot be had on a motion for a new trial in the Court of Common Pleas.

Crawford v. Jackson, 1 Rawle, 431.g

Demurrer to evidence is an admission of the truth of the fact alleged by the adverse party, or an acknowledgment that the evidence produced by him at the trial of the cause is true, but a denial of its operation and effect in law, whereupon the party demurs, and prays the judgment of the court; for, the fact being agreed on, the judges are the proper expositors of the law, and are to determine the same, and not the jury. But if a matter of evidence, which is thought material, be offered, and the court disallow or overrule it, this is a proper matter for a (a) bill of exceptions, which the judges are compellable to sign. Also, (b) if the court overrules one who offers to demur upon evidence, this is a proper case for a bill of exceptions, and the remedy which the statute in that case provides.

Co. Lit. 72; Allen, 18; Godb. 10; Raym. 404; 2 Jon. 146; Doct. pl. 318; Jones v. Vanzandt, 2 M<sup>c</sup>Lean, 596.g [The reason for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never appear on the record. *Per* Buller, J., Doug. 134.] (a) For this vide title *Bill of Exceptions*.—(b) 9 Co. 13; 2 Inst. 426; and Cro. Car. 341; Cort and The Bishop of St. David's adjudged.—Jon. 331, S. C., by which it appears, that a bill of exceptions was tendered and signed.

||A demurrer to evidence is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed, because the evidence offered on the one side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are in general discharged from giving any verdict; and the demurrer being entered on record,

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is afterwards argued and decided in the court in bank, and the judgment there given may ultimately be brought before a court of error.

See 1 Arch. Prac. 186; Stephen on Plead. 112; Tidd's Prac. 865, (9th ed.); and for fuller information on this sort of demurrer, see 2 H. Bl. 187; and see 2 Barn. & C. 445; Phillips on Evid. ch. 9, (7th ed.)|| *β* Woodgate's administratrix v. Threlkeld, 3 Bibb, 527; Hart v. Calloway, 2 Bibb, 460; 2 Bibb, 23; 1 Bibb, 180, 612.*g*

If in ejectment, or any other action, the plaintiff give in evidence any matter in writing or record, or a sentence in the spiritual court, and the defendant offer to demur thereupon, the plaintiff cannot refuse joining in demurrer, but must do the same, or waive his evidence.

5 Co. 104 a, Baker's case; Cro. Eliz. 751, 752, S. C. adjudged, because there cannot be any variance of a matter in writing.

Also, if the plaintiff produce witnesses to prove any matter of fact, upon which any question of law arises, and the defendant admit their testimony to be true, in such case likewise the defendant may demur; so the plaintiff may demur upon the evidence offered by the defendant *mutatis mutandis*.

5 Co. 104; Cro. Eliz. 752, S. C.—Where it is said, that if either party offer to demur upon any evidence given by witnesses, the other, unless he pleaseth, shall not be compelled to join; because the credit of their testimony is to be examined by a jury; and the evidence is uncertain, and may be enforced more or less, but both parties may agree to join in demurrer upon such evidence.—Also it is said, that in a demurrer upon evidence the party demurred unto may demand judgment of the court, whether he ought to join in the demurrer; for if there be not a colourable matter to ground the demurrer upon, the court will not force the party to join in it, but will overrule it, that justice may not be frivolously delayed. Lil. Reg. 437. {If the court think the evidence clearly against the party offering the demurrer, they may refuse to compel the other party to join. 1 Wash. 152, Hoyle v. Young; Ibid. 220, Thweat v. Finch; Ibid. 362, Wroe v. Washington.}

But in the case of the king, he by his prerogative is not obliged to join in any demurrer; but in case any doubt arises, the court may direct the jury to find the matter special, and thereupon determine what the law is.

Co. Lit. 72 a; Dyer, 53, pl. 8; Cro. Eliz. 752; 5 Co. 104, S. P. The king by his prerogative may waive his issue and demur in law, and *e. cont.* Plow. 85 a, 236.

He that demurs upon evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court: and if the matter of fact be uncertainly alleged, or it be doubtful whether it be true or not, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true.

Allen, 18, Wright v. Paul Pinder, said to be resolved. Stile, 22, 34, S. C. *β* On a demurrer to evidence, the testimony is to be taken most strongly against him who demurs; and such conclusions as a jury might justifiably draw, the court ought to draw. Pawling et al. v. The United States, 4 Cranch, 219. The demurrer to evidence should state the facts of the case as relied upon; and not merely the evidence conducing to prove them. Fowle v. The Common Council of Alexandria, 11 Wheat. 320; Thornton v. The Bank of Washington, 3 Peters, 36. See Young v. Black, 7 Cranch, 565; Snowden v. Phoenix Ins. Co., 3 Binn. 457; Maus v. Montgomery, 11 S. & R. 329; Feay v. Decamp, 15 S. & R. 231; Duerhagen v. United States Ins. Co., 2 S. & R. 185; Dickey v. Schreider, 2 S. & R. 413; M'Kinley v. M'Gregor, 3 Whart. 370.*g*

As, if it be alleged by one party that there is such a writ, which is denied by the other, and thereupon there is a demurrer to the evidence; upon this there can be no judgment given, for the being or not being such a writ is a fact that the jury should determine; but in this case a writ should have been admitted *tiel quel*, and then the effect thereof might have been deter-

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mined by the court; and in this case both parties having misbehaved themselves, the one in offering and the other in joining in demurrer, the court held, that judgment could not be given for either, but that an *alias venire facias* should be awarded.

Stile, 22, 34; Allen, 18. (a) In Stile, 34, it is said by Rolfe, that a new *venire facias* should go in the same manner as if a special verdict be found insufficient; but in Allen, 18, the opinion of the court was, that an *alias venire facias* should be awarded, and not a *venire de novo*, because no verdict was given.

If a matter of record, or other matter in writing, be offered in evidence to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence: and the reason given for it is, that there cannot be any variance of matter in writing. The books also agree, that if *parol* evidence be offered, and the adverse party demur, he who offers the evidence may join in demurrer if he will. But the language of the old books is very indistinct upon the question, whether the party offering *parol* evidence shall be *obliged* to join in demurrer. In a late case which came before the House of Lords, (Gibson and Johnson v. Hunter, 2 H. R. 187,) it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance, than a matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for *obliging* the party offering evidence in writing, to join in demurrer, applies to the first sort of *parol* evidence; but it does not apply to *parol* evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases, however, if the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this *parol* evidence than in a matter in writing; and in such case the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to circumstantial evidence, unless the party demurring will distinctly admit, upon the record, every fact, and every conclusion, which the evidence offered conduces to prove, it is not competent to him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer: though, if the party offering the evidence consent to waive the objection, and to join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to: and the court will, if they can, give judgment upon such evidence: but otherwise, a *venire de novo* must be awarded.

Tidd's Prac. (7th ed.) 892, 893. 2 White v. Fox, 1 Bibb, 374; Chapize v. Bane, 1 Bibb, 613; Burton v. Brashear, 3 Marsh. 377; Dougl. 119; 2 H. Bl. 209; 2 Cain. 131, Day v. Wilber; 2 Cain. Er. 158, Smith v. Steinback; 1 Johns. Rep. 241, Patrick v. Hallett & Bowne; 5 Johns. Rep. 1, Lewis v. Few. See 1 Dall. 21, Hurst v. Dupon.—The inferences admitted are, however, only such as a jury might fairly and justifiably draw from the evidence; forced and violent inferences are not admitted. 2 Wash. 203, Stephens v. White; 4 Cran. 219, Pawling v. The United States.}

The whole operation of entering the matter upon record, and conducting



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a demurrer to evidence, is and ought to be under the direction and control of the court, upon a trial at bar, or of the judge at *nisi prius*; subject, however, to an appeal, by bill of exceptions, if the demurrer be refused. And where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate, to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*.

2 H. Black. 208; Cro. Car. 341; Bull. N. P. 313.  $\beta$  It is matter of discretion with the court, whether or not to compel a party to join in a demurrer to evidence. Young et al. v. Black, 7 Cranch, 565. $\gamma$

The question upon a demurrer to evidence being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection to the pleading.

Dougl. 218.]  $\beta$  On a demurrer to evidence, the judgment of the court stands in the place of the verdict of a jury; and the defendant may, therefore, take advantage of any defects in the declaration by a motion in arrest of judgment, or by writ of error. Bank of the United States v. Smith, 11 Wheat. 171. See Ross v. Eason, 4 Yeates, 54. $\gamma$

{A demurrer to evidence may be allowed at any time before the jury retire, although the party offering the demurrer may have examined witnesses, the whole evidence on both sides being stated; which ought always to be done.

1 Wash. 151, Hoyle v. Young.}

Upon a demurrer to evidence, though the matter of fact be confessed, yet the jury may inquire of the damages, and assess them conditionally, viz.: if upon the argument of the demurrer the law should be for the plaintiff, then so much, &c. Also, it hath been resolved, (a) that the damages may be inquired of by a writ of inquiry of damages, when the demurrer is determined; and it is said to be the most usual course, when there is a demurrer upon evidence, to discharge the jury without more inquiry.

Plow. 408; Scholastica's case, Style, 22. (a) Cro. Car. 143, Darrose v. Newbett.

Error of a judgment in the palace court in *assumpsit*, where to prove the consideration an arrest was to be proved by the plaintiff; and for that he did not produce the writ the defendant demurred on the evidence, and thereupon judgment was given for the plaintiff; and now to reverse the judgment it was said for the plaintiff in error, that the king's writs are matters of record, and are not to be proved but by themselves; and it was agreed by the court, that the writ ought to have been produced in evidence, but by the demurrer it is confessed, the arrest being matter of fact, though it be proved by a matter of record; and the jury might of their own knowledge know that there was a writ; and by the demurrer on the evidence all matters of fact are confessed that the jury could know of their own conusance.

Lev. 87, Fitz-Harris v. Boiun.

$\beta$  When the party excepts to the admissibility of evidence, and afterwards demurs to the same evidence, the demurrer supplants the bill of exceptions.

Chapize v. Bane, 1 Bibb, 613.

A demurrer to evidence waives all objections merely formal, and what would be cured by a verdict would be cured by a demurrer to evidence.

Caldwell v. Süteman, 1 Rawle, 212.

When the plaintiff gives parol evidence of a fact, which is not evidence of any other fact, but is of itself a substantive ingredient of the case, to which the defendant demurs, the plaintiff may be required to join in the demurrer,

(O) *Plea at what Time to be put in, &c.*

and if he refuse to join in it, except on terms not approved by the court, the plaintiff's evidence will be considered as withdrawn, and the court may so instruct the jury.

*Crawford v. Jackson, 1 Rawle. 427.*

(O) *Plea at what Time to be put in, and the Ceremony requisite therein.*

If the defendant neglects to put in his plea, when the rules for pleading are out, the plaintiff may sign judgment for want thereof; but if the matter which is to be pleaded is difficult, the court will upon motion grant the defendant longer time to put in his plea than otherwise by the rules of court he ought to have; but without leave of the court he cannot have longer time, because the court is to judge whether it be necessary to plead such a plea as requires longer time to consider of than ordinary; and should it be otherwise, the defendant might upon such pretences delay the plaintiff without cause. *c.*

Lil. Reg. 36. 37. (a) It is usual now to grant time, by judge's order obtained on summons for that purpose.—[When a summons is taken out, and made returnable, before the expiration of the time for pleading, it is a stay of proceedings, pending the application; but it is otherwise, when taken out, or made returnable, after the expiration of the time for pleading. See R. 165; Barnes, 240, 253; Cas. Pr. C. B. 137; Pr. Reg. 292. S. C.; Barnes, 255; Cas. Pr. C. B. 144, S. C.; Barnes, 254; Pr. Reg. 293, S. C.] In the latter case the plaintiff may sign judgment before the summons is returnable, 2 Black. R. 954. But he cannot sign judgment afterwards, 2 Barn. & A. 355; 1 Carr. R. 93; 6 Term. 240. Nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading, as to discharge the defendant out of custody upon common bail, &c. *Per cur.* Mich. 26 G. 3.] [Vide Tidd's Prac. 482, 483, (7th ed.)]

Also, where the plaintiff doth keep any deed, or writing, or other thing from the defendant, which doth belong unto him, and whereby he is to make his defence, and is disabled, by the retaining thereof, to plead for his best advantage, the court will upon a motion grant an imparlance to the defendant till the plaintiff do deliver it to him, or bring it into court, and also a convenient time after till he can draw up his plea; for the law gives every defendant convenient time to make his best defence; and in this case, if the plaintiff be delayed, it shall be adjudged his own default.

Lil. Reg. 37.

So where an executrix was sued by special original, it was moved, that being executrix she might imparl till next term, that she might know how to plead with safety; the motion was granted for four days to plead, and afterwards for three more; but the court refused to enlarge it to the following term, because of the inconvenience that might accrue to other creditors; and in doing it thus far obliged the defendant to enter into terms not to acknowledge judgment in the mean time to other creditors that were in equal degree with the plaintiff, nor to do any thing to his prejudice. (b)

Hil. 5 G. 2 in B. R., *Snelgrave v. Morris, Executor of H. Morris, and S. P.*, so ruled between the Bank of England v. Morris, 2 Stra. 1002, 1028; Ca. temp. Hard. 165; 2 Barnard. K. B. 183. (c) Now, if defendant obtains, by a judge's order, time to plead, it is customary to insert the like conditions.

So a defendant had time to plead given till the second day of the next term, upon affidavit that four days before the declaration delivered he was and still continued to be so indisposed in mind that he could not make his defence.

Trin. 5 G. 2, in B. R., *Knight v. Robinson.*

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When a person appears upon a recognisance, or *in propria persona*, or is a prisoner in custody upon any information for a misdemeanor, where no process issued out to call him in, by the course of the court in these cases, he must plead *instantèr*.

5 Mod. 215.

Those that come in upon a *habeas corpus* or attachment must plead the same term without imparlance, giving the ordinary rules, which are eight days. (a)

Comb. 3, *per Aston*. (a) This must depend on the situation of the cause when removed, the time when the *habeas* is returnable, and the person who sues it forth, &c.

A plea in abatement must be pleaded within four days, without special leave from the court, because the person coming in by the process of the court ought not to have time to delay the plaintiff: also such plea by the 4 & 5 Ann. c. 16, being for delay, is not to be received, unless on oath, and probable cause shown to the court.

Comb. 251; vide *suprà*, tit. *Abatement*, (O) 27.

Upon a *respondeas ouster* they have usually four days' time to plead; but this is said to be in the discretion of the court.

Comb. 19.

By the rule of the court, as many days are allowed for the defendant to plead after oyer given as he had by the rule of the court at the time of oyer demanded.

Mich. 4 G. 2, in B. R., *Andrews v. Dingley*; 2 Stra. 877, and Barnard. K. B. 368, S. C., but S. P. does not appear.

[In B. R., if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*.

R. T. 5 & 6 G. 2, and see R. M. 10 G. 2, Reg. 2;] {*sed* vide 8 Term, 87, *Barton v. Moore*.}

Defendant had an order by consent from a judge for eight days' time to plead, and at the expiration of the eight days plaintiff signed judgment, without giving a rule to plead; *et per cur.* the judgment is regular; rules are only to give the parties notice when they are expected to plead; here, the defendant's praying time to plead excludes any presumption that the plaintiff has not given him such notice.

Mich. 7 G. 2, in B. R., *Starkie v. Wilkes*. {See 3 Bos. & Pul. 180, *Decker v. Shedden*.}

If the defendant do not plead according to the rules of the court, so that the plaintiff may enter judgment upon a *nil dicit*, yet if after the rules are out the defendant put in his plea into the office before the plaintiff hath entered his judgment, this plea is to be accepted, and the plaintiff ought not then to enter his judgment; and if he do, the judgment may be set aside for irregularity.

2 Lil. Reg. 298, 299.

[In B. R., where the defendant has appeared, or filed bail, upon any kind of process, returnable the *first* or *second* return of any term; if the plaintiff declare in London or Middlesex, and the defendant live within twenty miles of London, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or, in case the plaintiff declare in any other county, or the defendant live above twenty miles from London, within *eight*

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days *exclusive* after the delivery or filing thereof; and the defendant *must* plead accordingly without any imparlance.

R. T. 5 & 6 G. 2.

Where the defendant has not appeared, or filed bail, the rule in B. R. is, that "upon all process returnable before the *last* return of any term, where no affidavit is made and filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead in *eight* days *exclusive* after the filing or delivery thereof; and if the defendant do not file common bail, and plead within the said *eight* days, the plaintiff, having filed common bail for him, may sign judgment for want of a plea." But, if the declaration be not filed until *after* the return of the process, the defendant has *eight* days to plead from the time of filing it, whenever it may be. And "upon all process, where an affidavit is made and filed of the cause of action, the declaration may be filed or delivered *de bene esse* at the return of such process, with notice to plead in *four* days after the filing or delivery, if the action be laid in London or Middlesex, and the defendant live within *twenty* miles of London, and in *eight* days, if the action be laid in any other county, or the defendant live above *twenty* miles from London; and if the defendant put in bail, and do not plead within such times as are respectively before mentioned, judgment may be signed." But in all the foregoing cases the declaration should be delivered or filed, and notice thereof given *four* days *exclusive* before the end of the term, a rule to plead duly entered, and a plea demanded, when necessary.

R. T. 22 G. 3; 1 Barr. 56, *Delatre v. Mango*, Mich. 20 G. 3; *Tidd's Prac.* (7th ed.) 476, 477.

When the process is returnable the *last* return of the term, or where it is returnable before, but the declaration is not delivered or filed, and notice thereof given, *four* days *exclusive* before the end of the term, the defendant is entitled to an imparlance, and must plead within the first *four* days of the next term, provided the declaration be delivered or filed, and notice thereof given before the *essoin*-day of that term, otherwise the defendant will be allowed to imparl to a subsequent term.

*Tidd's Prac.* (7th ed.) 478.

If four terms have elapsed since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead before judgment can be entered against him, unless the cause have been stayed by injunction or privilege; and the notice in such case must be given before the *essoin*-day of the term: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation.

R. T. 5 & 6 G. 2; 2 Barr. 660; Dougl. 71; 2 Black R.; 2 Stra. 1164; 1 Stra. 211; *note*. 2 Term R. 40.

After a defendant in a *quo warranto* information has appeared, the prosecutor must give two four-day rules to plead, and after the expiration of the last, must also move in term time for a peremptory rule to plead, otherwise the defendant has until the next term to plead.

6 Term R. 394. In all criminal prosecutions for misdemeanors two four-day rules are given to plead, and a peremptory rule moved for; and then, if there be a demurrer, one four-day rule to join in demurrer, and a peremptory rule moved for. *Ibid.* *Rex v. Sayer*.

The time allowed persons in confinement charged with offences against the excise laws, is, in case such persons are confined in any jail within the distance of *forty* miles from London, *six* days; if above *forty* miles, *eight*

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days, after the delivery of the copy of the indictment or information to such persons, or to the jailer, keeper, or turnkey of the jail, with a notice thereon endorsed.

R. T. 35 G. 3.

A prisoner need not give notice of a plea, unless he files it before the time when by the rules of the court he is compellable to plead.

Rusholm v. Chapman, 5 Term R. 473; Thomas v. Prichard, 4 Term R. 664; {8 Term, 596, Parkinson v. Thompson; and see 4 Bos. & Pul. 273, Gandy v. Borrowdale.}

A plaintiff must make a demand of a plea before he signs judgment, and he cannot sign judgment until the expiration of twenty-four hours after the demand has been made. But the demand may be made at the time of delivering the declaration.

Dyche v. Burgoyne, 1 Term R. 454; Bowles v. Edwards, 4 Term R. 118; Churchwardens of Edmonton v. Osborne, 6 Term, R. 689. {See 8 Term, 465, Palk v. Rendle; 5 Bos. & Pul. 461, Ramsey v. Lord Reay; 2 Bos. & Pul. 363, Hifferman v. Langelle.}

Time to plead under a judge's order, is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires.

Kaye v. Whitehead, 2 H. Black. 35. {But see 1 Bos. & Pul. 479, Freeman v. Jackson.}

If a rule to plead expire on a *dies non juridicus*, supposing such day not to be *Sunday*, the defendant is bound to plead on or before that day; and if he do not, judgment may be signed on the next day; for the offices are open on all the other *dies non juridici*, but *Sunday*.

Mesure v. Britten, 2 H. Black. 616.]

Every special plea must have counsel's hand, otherwise it will be rejected, and the plaintiff may sign judgment; but if there be two defendants, and one plead a general issue, and the other specially, and both are on the same paper; though the special plea is not signed, the plaintiff cannot reject the general issue, and take judgment against both; for, if he do, the judgment is totally erroneous, and if execution be sued, restitution shall be awarded: but the plaintiff may regularly take judgment against him who pleaded specially.

2 Lil. Reg. 299; [Tidd's Prac. (7th ed.) 699.]

A foreign plea must be engrossed in parchment, and signed by counsel, and put in upon the oath (a) of the defendant, that is, he must swear that his plea is true, or such a plea is not to be received; because thereby he endeavours to oust the court of its jurisdiction.

Lil. Reg. 299; Stile, 373, 345; and vide Hetl. 126. (a) If one will not swear a foreign plea, where he ought to do it, the plaintiff may enter judgment upon a *nihil dicit*. Stile, 225.

Error was assigned, that the defendant in the writ of error was dead before the first judgment given, and it appearing by affidavits that he was alive, and that it was a trick merely for delay, the court determined to overrule the plea, unless the plaintiff would swear that it was true.

Sid. 172; Keb. 477, 479, 658, 823.

§ When the defendant offers to plead specially a matter of law, necessary for his defence, after having already pleaded, it is error to refuse it, unless it is put in evidently for delay.

Young v. Commonwealth, 6 Binn. 68.

A former recovery may be pleaded at any time before verdict.

Lacroix v. Macquart, 1 Miles, 42.g

## (P) Continuance and Discontinuance in Pleading.

At common law no plea could be determined but in the presence of the parties, unless default was made by one of the parties, and not excused; and therefore by the statute Westm. c. 28, to save delays at the *nisi prius*, they ordered that the inquest should be taken, though the defendant made default, and did not appear. Hence it became necessary, after issue joined, that there should be continuances from time to time till the verdict was taken, as before issue joined, a continuance was given the defendant from term to term until his plea was put in; and if these continuances were not entered from term to term, the defendant was without delay in court; and wherever he was so, there was an end of the proceedings in that writ; for he had fulfilled the command of that writ in appearing, and the court might give judgment against him if he did not plead; and if the court neither gave him leave to plead, nor gave judgment against him for want of a plea, he having fulfilled the writ, the matter was at an end; so, if he had pleaded, and the court had not given a day to the parties to prove their allegations, there likewise, the defendant having appeared, the writ was complied with, and the matter at an end, unless the court gave further time to verify the allegations; and therefore in such cases there must be continuances till the verdict.

Bro. *Discontinuance*, (1), (2); 6 Mod. 283; Roll. Abr. 487, 488; Cro. Ja. 528; Cro. Car. 236.

So, upon a demurrer, or after a verdict given, if the court give time to consider of their judgment, they must give day to the parties, because they can determine nothing in the absence of the parties, and the command of the writ being complied with by the defendant's appearance, and the effect of the writ answered, it is at an end; and the court can give time only from one term to another; for if they could give day to a second term, they might give it to a 5th, 20th, or 100th, and they would have power to delay *ad infinitum*.

Roll. Abr. 484; 3 Bulst. 233; Stile, 339. Vide 1 Bulst. 144, S. P., *cont.* but is not law.

If a man declares in an action upon the statute of monopolies, as the king's patentee of soap, and after the defendant in Easter term pleads, that the king did not make any such letters patent, and issue is joined thereupon, and day given to the plaintiff till Mich. term, but there is no continuance between Easter and Trinity term, it is a discontinuance; for though the court might give day to bring in the letters patent in Mich. term, omitting Trinity term, yet there ought to be a continuance between Easter and Trinity term by *a curia advisare vult* till Trinity term, or otherwise it is a discontinuance.

Roll. Abr. 483; Stile, 339, *Friend v. Baker*, adjudged.

In ejectment, if the defendant at the day of *nisi prius* at the assizes pleads that the plaintiff entered into parcel of the land pending the writ, and the justices of *nisi prius* accept the plea, and dismiss the jury, though they do not give any day to the parties *in banco*, yet this is not any discontinuance, although the plea is collateral; for the day of *nisi prius* and the day in bank are but one day, for the court *in banco* gave day to the jurors *in banco nisi prius justiciarii ad assisas venerint*, and to the parties (a) day is given there absolutely.

Roll. Abr. 486; Lane, 81, 86, 89, *Sir Hugh Brown's case*. (a) If the issue is found against the defendant, it is not material whether he had a day *in banco* or not; because

## (P) Continuance and Discontinuance in Pleading.

he hath nothing further to do but to discharge himself. Palm. 333; Cro. Car. 236; and vide Cro. Ja. 528.

If a man recovers upon demurrer, or by default, &c., and a writ of inquiry of damages is awarded, there ought to be discontinuances from term to term between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete till the second judgment upon the return of the writ of inquiry of damages. •

Roll. Abr. 485; Pipe v. Agar, Roll. R. 408, S. C. But 3 Bulst. 208, S. C., it is held by the clerks, that there is no necessity to have the continuance entered after the writ of inquiry awarded; and per Coke it is good either way.—If a judgment be given in trespass, or other such action, by default or upon demurrer, and a writ of inquiry of damages awarded, returnable the next term, no continuance *per idem dies* shall be given to the defendant, because he is out of court by his own default; said to be the constant course of the Court of King's Bench. Roll. Abr. 486. But for this vide 11 Co. 6 b; Cro. Eliz. 75, 144, 774; Roll. R. 38; Godb. 195; Sid. 16.

In an action of debt in an (a) inferior court, if the defendant acknowledges the action at one court, and no judgment is entered at this court, but at the next court judgment is given for the plaintiff; if there be no continuance between the said courts, this is a discontinuance.

Roll. Abr. 486, Thornton v. Wade, adjudged. (a) That the process in an inferior court must be returned at a day certain, and ought to be to the court as well as to the day. Vide Cro. Eliz. 105; Cro. Ja. 314; Stile, 58, 66, 70, 122; Cro. Car. 254; 2 Bulst. 36; Mod. 81; 2 Mod. 59.—But if a continuance be made in an inferior court *ad proximam curiam ibidem tenendam*, without alleging any day to which it is adjourned, yet, if the court be to be held by custom, not at any certain day, as every week, or *de tribus in tra*, &c., but *die lune*, when the judges thereof please, this is a good continuance. Cro. Car. 254.—In a pie-powder court the adjournment was entered *idem dies datus est*, where it should have been *eadem hora*, yet adjudged good. Moor, 459, pl. 637.

If in an action upon the case in an inferior court the defendant is essoigned, and hath a day *per essoigne*, and the plaintiff *habet eundem diem*, at which day the defendant being demanded appears not, but makes default, *et habet diem per defaultam secundum consuetudinem ville* given by the court, &c., this is a discontinuance; for when the defendant made default he was out of court, and so no day (b) could be given to him; and the custom alleged cannot help that which is against the common law.

Cro. Ja. 357, Peplow v. Rowley. (b) For this vide Cro. Car. 341; Jon. 331; Yelv. 155; Stile, 328, 329.

If, in a *quo warranto* against a corporation for using a fair and market, and taking toll, &c., issue is taken whether they have toll by prescription or not, and it is found for the defendants, the attorney-general may yet proceed to take issue upon the rest, for in the case of the king there is no discontinuance before judgment.

Hard. 504, Attorney-General v. Town of Farnham. That when the king is party no day is given to him, because he is always present in court. Roll. Abr. 486, 487.

In an action after issue joined, and a verdict for the plaintiff, the plaintiff cannot discontinue the action without the consent of the defendant; and if he will not enter the judgment, the defendant himself may enter it.

Roll. Abr. 487.—But for this vide Stile, 346; Sid. 60; Lev. 48; Mod. 13.—Where there has been a discontinuance after a special verdict. Latch. 216; Hedl. 3; Cro. Car. 575; Salk. 178.—Where by the course of the court the plaintiff may discontinue without motion, paying costs. Stile, 366; Leon. 105.—Where after a demurrer by leave of the court. Cro. Ja. 317; Cro. Car. 195; March, 24; Stile, 120, 134, 306, 309, 310, 392; Allen, 20; Sand. 23; 2 Sand. 74; Sid. 84, 306; Lev. 227, 298; 2 Lev. 118, 124; Mod. 41; Bulst. 217.

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If a man vouches for parcel, and as to the rest makes no answer, and the demandant does not take advantage thereof by prayer of seisin, but suffers the process to be continued against the vouchee in right of the parcel, all is discontinued.

18 E. 3, 40; Roll. Abr. 487.

If the tenant vouches for all the demand, and the process upon the voucher is made for less than it is, all is discontinued.

18 E. 3, 40; Roll. Abr. 487.

In an action for trespass a discontinuance in parcel is a discontinuance in the whole.

7 H. 6, 27; Roll. Abr. 487.

In trespass for several things the defendant pleads a plea in bar for part, and does not answer to the rest, and the plaintiff demurs generally, the plaintiff shall not have judgment against the defendant; for the demurrer was by intendment upon the bar, and not for want of pleading to the residue; for he ought to have prayed judgment upon *nil dicit* for it, so all is discontinued.

4 Co. 62; Roll. Rep. 135, 176; 2 Bulst. 325.—But where for want of answering to part all is discontinued, vide Brownl. 228; Carter, 51; 2 Mod. 259; Yelv. 65; Sid. 223.

If a plea begins with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is discontinued.

Salk. 179, pl. 6; Ld. Raym. 679; and vide Salk. 180, pl. 9, S. P.; 1 Stra. 302, S. P.

{And a discontinuance as to one defendant is a discontinuance as to all. In *assumpsit* against three, two pleaded a debt of record by way of set-off; the plaintiff replied *nil tiel record*, and gave a day to the two defendants, but entered no suggestion respecting the third; it was held that the plaintiff had thereby made a discontinuance.

1 Bos. & Pul. 411, Tippet v. May.}

In *indebitatus assumpsit* the defendant pleaded an attainder of high treason in disability; the plaintiff replied a pardon, *prout per exemplification. inde, &c.*, (which was held good,) *et petit judicium et damna sua*; to which it was demurred; and held, that there was a discontinuance by the misconception of the replication, for an ill prayer of judgment is as none.

Salk. 177, pl. 1; Bisse v. Harcourt, Ld. Raym. 338.

It is said, that the course of the Court of King's Bench is to enter no continuance on the roll till after issue or demurrer, and then to enter the continuance of all upon the back (a) before judgment.

Roll. Abr. 485. (a) A discontinuance can never be objected *pendente placito*, for before judgment it may be continued at the pleasure of the court, though not after judgment in another term. Cro. Ja. 211.—But at what time continuances may be entered, vide Savil. 54; Lit. R. 4; Cro. Car. 236.

In debt, the declaration was of Michaelmas term, and the plea roll of Easter, and no continuance entered, and this upon demurrer was showed to the court as a discontinuance; but they said the practice is never to enter



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continuances till the plea roll be entered up, though the declaration be of four or five terms standing.

Salk. 179, pl. 7; Curtius v. Padley, Ld. Raym. 872.

If the plaintiff be nonsuit, by which the defendant is to recover costs, if the plaintiff will not enter his continuances, on purpose to save the costs, the defendant shall be suffered to enter them, and so recover his costs.

Roll. Abr. 487, like point in Godb. 219; Cro. Ja. 35, 316, 317.

If in trespass for breaking his house, and taking and carrying away his goods, the defendant justifies the whole, and the plaintiff *quoad fractionem domûs*, and the taking the goods, *nec non materiam in ea contentam*, demurs upon the defendant's bar, and the defendant joins in demurrer in this manner, *quia placit. prædict. quoad fractionem domus*, and the taking the goods *sufficiens*, &c., and thereupon judgment is given, here is a discontinuance; for in the offer of the demurrer *ex parte querentis* nothing is alleged specially, but only *quoad* breaking of the house, and taking the goods; and though the subsequent words *nec non materiam in ea contentam* go to all the matter in bar, viz., the asportation; yet, when the defendant joins in demurrer, he joins but specially, *quoad* the breaking the house, and taking the goods, but says nothing as to carrying them away.

Yelv. 5, 6; Brownl. 192, S. C., Johnson v. Turner, adjudged.

If upon a writ of error upon a judgment in ejectment the plaintiff assigns for error the want of an original, and the defendant pleads, that such a day an original was delivered to, &c., and concludes to the country, and thereupon the judgment is reversed; here is a discontinuance; for when the defendant concludes to the country where the matter of his plea, viz., the delivery of the original, was triable by record, and the plaintiff does not reply or demur upon defendant's plea, here is not any perfect record.

Yelv. 117, St. John v. Comyn, adjudged, and the judgment upon a writ of error in B. R. in Ireland reversed upon a writ of error here accordingly; and vide Yelv. 138.

In an action of trespass against A, B, and C, A confessed judgment, and B and C pleaded severally not guilty, and several *venires* were awarded to try these issues, &c., but no day given to A, and it was resolved upon a writ of error upon a judgment *in banco*, that it was according to the course of the court, and that if it was a discontinuance it was helped by the verdict against B and C. (a)

11 Co. 5, 6; Roll. R. 30, S. C. (a) By the 32 H. 8, c. 30, discontinuances are aided, so that there be a verdict for the plaintiff or defendant; in the construction of which it hath been held, that if as to part the defendant joins issue, but says nothing as to the rest, and this issue is found for the plaintiff, he shall have judgment. 11 Co. 6 b; 2 Leon. 194; Godb. 55; Roll. R. 161; Cro. Ja. 353; Hob. 187; Golsb. 109; Bulst. 25; Carter, 51; 3 Lev. 39; Salk. 179, pl. 8, 180, pl. 9; 2 Ld. Raym. 856, 1121; 7 Mod. 24. But, if the matter is pleaded to the whole, though in fact but an answer to part, this is a bad plea, and not helped by the statute. Hard. 331.—That discontinuances, as well on the part of the plaintiff as defendant, are aided. Cro. Eliz. 489; Cro. Ja. 528.—That discontinuances, in inferior courts as well as superior, are aided, being within this act. Salk. 177, pl. 2.\* ¶Vide Tidd's Prac. (7th ed.) 706, 707, 708.]]

## \* CONTINUANCE OF SUIT OR PROCESS.

*When necessary.*—Defendant in custody on *capias ad satisfaciendum* was discharged on a written agreement; above a year after new *capias ad satisfaciendum* issues without continuance on the roll; it shall be set aside. Barnes, 205.—On *nul tiel record*, plaintiff may continue the day for bringing in the record. Barnes, 84.—*When not*—Continuance need not be entered on the record of *nisi prius*; therefore, if after issue

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[It is a rule that every pleading must be an answer to the whole of what is adversely alleged. Therefore in an action of trespass for breaking a close, and cutting down 300 trees, if the defendant pleads as to cutting down all but 200 trees, some matter of justification or title, and as to the 200 trees says nothing, the plaintiff is entitled to sign judgment, as by *nil dicit* against him in respect of the 200 trees, and to demur or reply to the plea as to the remainder of the trespasses. On the other hand, if he demurs or replies to the plea without signing judgment for the part not answered, the whole action is said to be discontinued. (a) For the plea, if taken by the plaintiff as an answer to the whole action, it being in fact a partial answer only, is, in contemplation of law, a mere nullity; and there is consequently an interruption or chasm in the pleading, which is called in technical phrase, a discontinuance. And such discontinuance will amount to error on the record. (b) It is to be observed, however, that as to the plaintiff's course of proceeding, there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case where by the commencement of the plea, he professes to do so, but in fact gives a defective and partial answer,

joined, and before day of *mini prius*, one of defendants dies, suggestion of it, and *nonne facies* between plaintiff and surviving defendant, *et jurata* at the foot, agreeable thereto, is good. Barnes, 469.—*How it shall be entered.*—When the trial is deferred, if the *nonne facies* is returned and filed, the proper entry is, that the jury *ponitur* in respect: if it be not filed, enter a *non nisi breve*; either way will prevent a discontinuance. Rex v. Hare and Man, Stra. 366.—If proper continuances are entered on the plea roll, the want of them on the *mini prius* roll is not material. French v. Wiltshire, And. 67.—If to declaration of Trinity, there is imparlance to Michaelmas term, and defendant procures judge's order for time to plead till the 15th of December, the imparlance shall be continued to quinden. Mart. Barnes, 161.—*At what time.*—If bill is of Easter, and in Trinity defendant pleads, and issue joined, and paper-book delivered without continuance from Easter to Trinity, it shall not be set aside; for it may be entered at any time on the roll. Wilkes v. Wood, 2 Wills. 903.

## DISCONTINUANCE.

*What shall be.*—It is not a discontinuance, though no day is given to the tenants in dower to appear on the return of the writ of inquiry; or it is aided by statute 4 & 5 Ann. c. 16; Dobson v. Dobson, Ca. B. R. temp. Hardw. 19.—*When it shall be by leave of the Court.*—After demurrer argued and allowed on payment of costs. Butler v. Malisay, 1 Stra. 76; Henderson v. Williamson, Mich. 5 G. Stra. 116.—The court may grant it after special verdict argued, but will not do it in a hard action. Boucher v. Dawson, Ca. B. R. temp. Hardw. 194.—The court will not permit an executor to discontinue in any case where he has *knowingly* brought his action wrong, but on payment of costs. Harris v. Jones, 3 Barr. 1451.—After judgment on demurrer for plaintiff, and error brought, plaintiff may discontinue on costs in action and error. Barnes, 169.—Plaintiff may discontinue, though defendant has been arrested a second time before discontinuance. Barnes, 169.—After judgment on demurrer in replevin for a woman, plaintiff cannot discontinue. Barnes, 169.—Rules should be drawn up, "*have leave or be at liberty*," to discontinue, not "*shall discontinue*." Barnes, 170.—Whether discontinuance may be entered without leave? Q. Barnes, 170.—Also, Whether plaintiff in replevin can discontinue? Q. Barnes, 171. [The avowant cannot, though an actor. 1 Stra. 112.]—Plaintiff cannot move to discontinue after defendant has moved for judgment, as in case of a nonsuit. Barnes, 316. Plaintiff may enter *nil capiat per breve* on a plea in abatement without leave, but not in other cases. Barnes, 257.—*When it shall be aided.*—If after judgment by default on a bill against an attorney in C. B. where the proceedings are on a day certain, the writ of inquiry is returnable at a general return, it is a miscontinuance, and aided by the statutes. Lauder v. Cripps, Stra. 947. The statute, 32 H. 8, c. 30, extends to discontinuances made *after verdict*; as, if the original process is returnable at a common return, and the *scire facies* in error is returnable at a day certain, this discontinuance is aided by the statute. Bern v. Bern, Mich. 8 G. 2, Ca. B. R. temp. Hardw. 72. [Vide Tidd's Prac. 7th edit. 706, 707, 708.]

(Q) Pleas *Puis darrein continuance*.

applying to part only. The latter case amounts merely to insufficient pleading; and the plaintiff's course therefore is not to sign judgment for the part defectively answered, but to demur to the whole plea.(c) It is also to be observed, that where part of the pleading, to which no answer is given, is immaterial, or such as requires no separate or specific answer—for example, if it be matter of aggravation—the rule does not in that case apply.(d)

(a) Com. Dig. *Pleader*, (E) 1; 1 Saund. 28, n. (3); 4 Rep. 62 a. (b) Cro. Ja. 353. Such error is cured however after verdict, by the statute of jeofails, 32 H. 8, c. 30, and after judgment by *nil dicit* confession or *non sum informatus*, by 4 Ann. c. 16. (c) 1 Saund. 28, n. (3). (d) Stephen on Plead. 233.]]

(Q) Pleas *Puis darrein continuance*.

THE defendant can regularly have but one plea, on which, if there be an issue or demurrer, the cause is to be determined, because there can be but one verdict in a cause; but if any new matter happens pending the writ, he may plead it after a former plea pleaded, provided he plead it before the next continuance after such new matter has happened, which is called a plea *puis darrein continuance*, because such matter being new it was not in his power to plead it when his former plea was pleaded; and it would be hard, because he had pleaded, to preclude him from an advantage which he had not at the time of pleading, since there was no laches in him; but this he cannot plead after a continuance, because having suffered the former plea to continue, he rests upon it, and waives the benefit of any new matter.

Doct. pl. 297; Salk. 178, pl. 5; Ld. Raym. 693. ||See Stephen on Plead. 81, 398.]] It is a matter of discretion with the court to receive a plea *puis darrein continuance* or not, even after more than one continuance. Morgan v. Dyer, 10 Johns. 161.g

§ In general a plea *puis darrein continuance* must be put in before a continuance has intervened, but the court may, for special reasons, permit the plea to be entered *nunc pro tunc*.

Wilson v. Hamilton, 4 S. & R. 239; Hostetter v. Kaufman, 11 S. & R. 146. See Lyon v. Marclay, 1 Watts, 271.

A plea *puis darrein continuance* that the lessor of the plaintiff had entered in and upon the possession of the defendant, &c., is not a good plea, either in bar or abatement; and whether good or bad, in substance or form, it is a waiver of all former pleas.

Price v. Sanderson, 3 Har. 426.g

In debt against an administrator, after demurrer joined, the administration was repealed, and granted to another, for which the defendant would have pleaded this matter, *puis darrein continuance*; but it was resolved not to be pleadable after demurrer, though it might after an issue joined.

Moor, 871, pl. 1202; Stonner v. Gibbons, 1 Stra. 493, S. P.; but see Hob. 81, *contra*.

||And in debt by an administrator it may be pleaded, that the plaintiff's letters of administration have been revoked *puis darrein continuance*.

Bull. N. P. 309.]]

So also that the plaintiff has become bankrupt, or is outlawed, or excommunicated, or that the defendant has become bankrupt and has obtained his certificate.

15 East, 622; 6 East, 413; Tidd's Prac. 878, (7th ed.)

So an executor defendant may plead a judgment recovered against him as executor since the last continuance, and it is no answer to such a plea that the judgment was obtained by confession of defendant.

5 Taunt. 333; 1 Marsh. 70.]]

(Q) Pleas *Puis darrein continuance*.

So, if a release be given after the day of *nisi prius*, and before the day in bank, he cannot plead it, because there is a verdict already in the cause, and upon another plea; and therefore the cause is determined, so that he is put to his *audita querela* to hinder the execution of the judgment.

21 H. 6, 10; Bro. Cont. 27.

But there are two cases where a man may plead, though it be not after the last continuance, viz., outlawry, and the death of the plaintiff: as to outlawry, it is upon the prerogative that the debt itself is forfeited to the king, and by virtue of the prerogative *nullum tempus occurrit regi*, and therefore he may plead it though a continuance has happened after the outlawry: so he may plead the death of the plaintiff, because, though a continuance has been entered, yet the continuance is a nullity, because there was no plaintiff in being to whom day could be given: so, it may be pleaded if the plaintiff died after the day at *nisi prius*,<sup>(a)</sup> and before the day in bank; and the reason is, that there is no cause in court, for no judgment can be given for a person who is not *in rerum natura*, and if it be given it is erroneous; and if the plaintiff's attorney will traverse the plea, he cannot say the plaintiff comes *per attorn.*, because that would be to forejudge the matter in issue; but the attorney by his name, viz. *J S venit pro magistro suo et dicit*, may appear, and so traverse it.

2 Lutw. 1143, 1174; 21 H. 6, 10; Doct. pl. 297; Lev. 80; Sid. 93, 133, 143, 185; 2 Lutw. 1143, 1174; 5 Mod. 12. (a) Death of a party between verdict and judgment not to be error, provided judgment be entered within two terms, 17 Car. 2, c. 8.

But a release, may, it seems, be pleaded, though there have been imparlances between, because there is no continuance of a former plea pleaded; and by the *libertas loquendi* the defendant has time given to plead what makes most for his advantage.

13 E. 4, 4.

But if the writ be only abateable, as if the plaintiff be made a knight,<sup>(b)</sup> or if the plaintiff, being feme sole, takes a husband, this must be pleaded after the last continuance, otherwise he depends on his first plea, and waives the benefit of his new matter: but it cannot be pleaded between the day at *nisi prius* and the day in bank, because there has been a trial in the same cause before.

2 H. 6, 13; Sid. 143. (b) Certain suits not to be abated for acceptance of knight-hood. 4 H. 6, c. 4.

But if the lessor of the plaintiff dies, this cannot be pleaded *puis darrein continuance*, because the right is supposed in the lessee: || and a release by the lessor of the plaintiff cannot be pleaded *puis darrein continuance*.||

Hob. 5; ||4 Maul. & S. 300.||

The pleas of this kind are twofold, viz. in abatement and in bar; if any thing happens pending the writ to abate it, this may be pleaded *puis darrein continuance* though there is a plea in bar, for this can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not any subsequent matter: but, though it be pleaded in abatement, yet after a bar is pleaded, it is peremptory, as well on demurrer as on trial, because, after a bar pleaded he has answered in chief, and therefore can never have judgment to answer over: so, it may be pleaded in bar: but, as to the manner of its being pleaded in bar or abatement, herein it is to be observed, that in the first case it must be pleaded *quod breve cassetur*, and in the other *quod actionem ulterius manutenere non debet*, and not that the former inquest should

(Q) *Plea Puis darrein continuance.*

not be taken, because it is a substantive bar in itself, and comes in the place of the former, and therefore must be pleaded to the action.

15 E. 4, 149; Allen, 66; 2 Lutw. 1143.

There can be but one plea *puis darrein continuance*, that the plaintiff may not be delayed *ad infinitum*, for, if he made a second change he might make a third, and so *in infinitum*: but some have held, that he might plead an outlawry after the last continuance, because *nullum tempus occurrit regi*, but *quare* whether the subject shall after plea *puis darrein continuance* partake of the prerogative, or whether it shall be presumed, after such trifling, that it is frivolous and untrue, and therefore to be rejected.

Bro. *Continuance*, 40; Fitz. *Continuance*, 5.

If a matter happens after plea pleaded, and before issue joined, it shall be pleaded to be done pending the writ; but if it happen after issue joined, it shall be pleaded *post ultimam continuationem*.

Bro. *Continuance*, 1; 26 H. 8, 2.

If the plaintiff release to the defendant after the award of the *nisi prius*, and at the day of *nisi prius* the jury remain *propter defectum*, the defendant may plead it the day in bank; because the cause was not determined by the jury, and therefore he is at liberty to plead it at any other day of continuance; and it may be tried by the jury, when they appear.

Bro. *Continuance*, 30; 22 H. 6, 1.

If the plaintiff, after a writ of inquiry awarded, release to the defendant, he cannot plead this release at the day in bank; because there is no day given him, and judgment is already: but, if the plaintiff dies, such death may be pleaded; because there is no person in court for whom judgment can be given: but now by the 8 W 3, c. 11, the executors, &c., may have a *scire fac.* on such an interlocutory judgment.(a)

(a) By this statute the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit.

|| Where a release has been given under circumstances of fraud, the courts will, in some cases, not suffer it to be pleaded. As where a landlord, with permission of his bailiff, who had made a distress for rent, commenced an action in the bailiff's name against the sheriff, for taking insufficient pledges, and the bailiff, without the landlord's privity, released to the sheriff, who pleaded it *puis darrein continuance*, the Court of Common Pleas set aside the plea, and ordered the release to be delivered up to be cancelled.

Hickey v. Burt, 7 Taunt. 48; and vide 1 Chitty R. 390; 4 Barn. & A. 249, 419; 7 Taunt. 421; 4 Moo. 192; 7 Moo. 617. || The sufficiency of a plea *puis darrein continuance*, when verified by an affidavit, cannot be rejected by the court; to test it, the plaintiff must demur. Day v. Hamburgh, 1 Browne, 75. Whether such plea can be received after a demurrer, *dubitalur*. Bauer v. Roth, 4 Rawle, 92.g

Time and place must be laid in this as in other pleas, and it must have the same certainty with other pleas.

Doct. pl. 297; Allen, 66; 2 Lutw. 1143.

It is no good plea to say *puis darrein continuance* such a thing happened, but it ought to be precise in the day.

5 Mod. 12; Yelv. 141.

One may plead *puis darrein continuance*, that the plaintiff brought a second action for the same cause, and recovered, though he might have pleaded the former in abatement to the second.

Comb. 357.

(C) *Plea Plea darrein continuance.*

*Plea plea darrein continuance* put in at the assizes must be certified as part of the record, and cannot be then tried.

2 Mod. 317.

If after a plea in bar the defendant pleads a plea *plea darrein continuance*, this is a waiver of his bar, and no advantage shall be taken of any thing in the bar.

SALE, 175, pl. 5; Ld. Raym. 693; Barber v. Palmer; and vide Hob. 61.—(a) A plea *plea darrein continuance* must be verified, or it will be set aside. Martin v. Wyatt, 200. 492. [See 5 TAxT. 333.]—If on an impetition to next term, plaintiff gives a release to defendant in the mean time, he may plead the release in bar as an original plea, as it is before issue; but if after issue joined, it must be pleaded *plea darrein continuance*. Price v. Kenrick, Fort. 338.—It cannot be rejected by the court if it be verified by affidavit, and they cannot determine whether it is a good plea or not, but on demurrer. Price v. Salmond, 2 Wils. 137; [5 TAxT. 337.]

It seems dangerous to plead any matter *plea darrein continuance*, unless you be well advised, because if that matter be determined against you, it is a submission of the matter in issue, and no *non pro* shall be granted. And the plea put in cannot be amended after the assizes are over: but it may during the assizes be amended before the judge of *non pro*.

CIV. CL. 45. A plea *plea darrein continuance* in bar of the action is a waiver of all former pleas. Even when abatement is pleaded *plea darrein continuance*, the judgment without issue denoting or verdict is final *quod recuperat*, and not a *respondent amittit*. Carter v. Eames, 14 Wend. 161; Kimball v. Huntington, 10 Wend. 675. But see Martin v. Cook, 15 Wend. 699; Ye. 151; Freeman. 252.

It is in the breast of the judge at *non pro* whether he will accept of such plea or not, &c. whether he will or will not proceed in the trial, therefore the party ought to make it appear to the judge that it is a true plea; yet the plaintiff is not to reply to this plea at the assizes, for the judge has no power to accept of such replication, nor to try it, but only to return the plea as part of the record of *non pro*: and if the plaintiff demur, it cannot be argued there.

How. 3 Mod. 317. It appears that the judge is bound to receive this plea, if verified by affidavit. 3 Ye. R. 554; 2 Wils. 137; 5 TAxT. 337; 1 Marsh. 70, acc. In order to prevent vexatious delay, the court will order a demurrer to such plea to stand for the first money day in next. 1 Stark. 62.]

A plea *plea darrein continuance* may be pleaded after the jury are gone from the fact, but not after they have given their verdict.

Parsons v. Perkins, Hill. 3 G. L. Bill, N. P. 310. [It may be pleaded at any time before verdict. 3 Ch. 172. Browne v. Beardsley.] A plea *plea darrein continuance* cannot be introduced after a verdict, or a plea and cognovit. Palmer v. Hutchins, 1 Cowen. 425.

There are some pleas which may be pleaded at *non pro* that cannot properly be termed pleas *plea darrein continuance*, because the matter pleaded need not be expressly mentioned to have happened after the last continuance.

How. Dig. 314. [The last continuance is the last day of the return of the venire. 200. 492. v. Hutchinson. 1 Cowen. 425.]

At the assizes that a plea *plea darrein continuance* was not put in in proper time, & that it was not verified by affidavit, or that it was accompanied by another plea, it may be made by motion to set the plea aside, and cannot be taken in objection.

Johnson v. McVea, 1 Wend. 225. [Nelson v. Mason, 21 Wend. 334.]

As it is known after issue joined, the defendant may plead that the plaintiff was deceived of money, without saying after the last continuance. So he may

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in like manner plead that the plaintiff was covert the day of the writ purchased, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the last continuance.—The diversity seems to be between such things as disprove the writ in fact, and such as disprove it in law.

Bro. *Continuance*, 57.

The last continuance where such plea is pleaded at the assizes, is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *distringas* or *habeas corpus* till the next term *nisi prius*, &c.]

{See 3 Cain. 173; 2 John. Rep. 294.}

¶ If any matters pleadable *puis darrein continuance* happen after plea, and before the return of the *venire facias*, they must be pleaded in bank. But matters arising after the return of the *venire facias*, may be pleaded either in bank or at *nisi prius*.

5 Taunt. 333; 1 Marsh. 70, S. C; and see 5 Barn. & A. 853.

Where a continuance was entered from Trinity to the first day of Michaelmas term, and matter arising in the interval was pleaded after the first day of Michaelmas term *puis darrein continuance*, the court ordered the plea to be taken off the file.

3 Barn. & C. 612, 317. ¶ An objection to a plea *puis darrein continuance*, on the ground that it was not pleaded in proper time, cannot be taken advantage on demurrer, it should be on motion to set aside the plea. Ludlow v. M'Crea, 1 Wend. 228.g

[If the matter of the plea arise by deed, it ought to be pleaded with a *profert*.

Salk. 519.

The form of the plea, if at the assizes, is as follows:—"And now at this day, that is to say, &c., comes the said C D by R H, his counsel, and says, that the said A B ought not further to maintain his action against him the said C D, because he says that after the day of last past, from which day until the day of in Michaelmas term next, (unless the justices of our lord the king, assigned to hold the assizes of our lord the king in and for the county of C, should first come on the day of at B in the said county of C,) the action aforesaid is continued, to wit, on, &c., at, &c., the said A B by his deed dated, &c., did release."—And to show the particular matter, and conclude, "And this he is ready to verify, wherefore he prays judgment if the said A B ought further to maintain this action against him," &c.

Where a plea is certified on the back of the *postea*, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment.

Freem. 252.]

¶ In general, a plea *puis darrein continuance* may be pleaded without being verified by affidavit.

Jackson v. Peer, 4 Cowen, 418.g

## . PRÆMUNIRE.

(A) What Offences come under the Notion of a *Præmunire*.

(B) Of the Punishment therein.

(A) What Offences come under the Notion of a *Præmunire*.

THE offences coming under the notion of a *præmunire*, (a) or for which the party incurs a *præmunire*, are reduced by Serjeant Hawkins to the following particulars:

Hawk. P. C. c. 19. (a) So called from the word in the writ, which is used for *præmunere*. Co. Lit. 129; 3 Inst. 120.

1. The offence of making use of papal bulls is made a *præmunire* by many ancient as well as later statutes, to which purpose it is enacted by 25 E. 3, st. 6, § 4, called the statute of provisors, "That whoever shall, by a papal provision, disturb any patron to present to a benefice, &c., shall be fined and imprisoned till he make full renunciation. And it is further enacted by 25 E. 3, st. 5, c. 22, that if any one purchase a provision of an abbey or priory, he shall be out of the king's protection; and by 38 E. 3, st. 2, c. 1, and 12 Ric. 2, c. 15, and 13 Ric. 2, st. 2, c. 2, that whoever shall accept a benefice, contrary to 25 E. 3, st. 5, shall be banished; and by 13 Ric. 2, st. 2, c. 3, that whoever shall bring a sentence of excommunication against any person for executing the said statute of 25 E. 3, st. 5, shall suffer pain of life and member; and by 16 Ric. 2, c. 5, that whoever shall purchase or pursue, or cause to be purchased or pursued, in the court of Rome or elsewhere, any translations, processes, sentences of excommunication, bulls, instruments, or other things contrary to the tenor of that statute, which touch the king, against him, his crown, his regality, or his realm, or bring them within this realm, or receive them, &c., shall be out of the king's protection; and their lands and tenements, goods and chattels, forfeited to the king, and they shall be attached by their bodies; and by 2 H. 4, c. 3, that whoever shall purchase from Rome a provision of exemption from ordinary obedience; and by 2 H. 4, c. 4, that whoever shall put in execution bulls purchased by those of the order of *Cisterciens*, to be discharged of tithes, shall incur the like penalty. They are further restrained by 6 H. 4, c. 1, 7 H. 4, c. 8, 9 H. 4, c. 8, and 3 H. 5, st. 2, c. 4, by which the statutes above mentioned are enforced and explained; and it is further enacted by 23 H. 8, c. 2, § 22, that whoever shall sue for or execute any license, dispensation, or faculty from the see of Rome; and by 28 H. 8, c. 16," (by which all bulls, briefs, &c., heretofore obtained from Rome are made void,) "that whoever shall (b) use, allege, or plead the same in any court, unless they are confirmed by that statute, or afterwards by the king, shall incur the like penalty."

Vid. Reg. 54; 3 Inst. 197; 25 E. 3, st. 6, § 4. (b) Yet it hath been holden that the alleging an ancient bull in order to induce another principal matter whereon to ground a title, without claiming any thing from the bull itself, is not within this statute. 2 Lev. 251.



(A) What Offences come under the Notion of a *Præmunire*.

By the 13 Eliz. c. 2, those who purchase any bull, &c. from Rome, are guilty of high treason. But, as those ancient statutes continue still in force, it is in the election of the crown to proceed either upon them or 13 Eliz. c. 2. Also, by the said statute of 13 Eliz. c. 2, the aiders, comforters, and maintainers of such offenders, after the offence, to the intent to uphold the said usurped power, incur a *præmunire*.

Davis, 84.

Secondly, The derogating from the king's common law courts is said to have been an high offence at common law, and is made a *præmunire* by many ancient statutes; for by 27 E. 3, c. 1, of provisors, "If any subject draw any out of the realm in plea, whereof the cognisance pertains to the king's court, or of things whereof judgments be given in the king's courts, or sue in any other court to defeat or impeach the judgments given in the king's courts, he shall be warned to appear, &c., in proper person, at a day containing the space of two months, at which if he appear not, he and his proctors, &c., shall be put out of the king's protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the king's will," &c.

And by 16 Ric. 2, c. 5, "Both those who shall pursue, or cause to be pursued in the court of Rome, or elsewhere; any processes, or instruments, or other things whatsoever which touch the king, against his crown and regality, or his realm, and also those who shall bring, receive, notify, or execute them, and their abettors, &c., shall be put out of the king's protection."

16 Ric. 2, c. 5.

In the construction of these statutes it hath been holden, that certain commissioners of sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*.

2 Buls. 299; 3 Inst. 125; Cro. Ja. 336.

Also, suits in the admiralty or ecclesiastical courts within the realm, for matters which upon the face of the libel itself appear to belong only to the cognisance of the temporal courts, are said to be within 16 Ric. 2, c. 5, by force of the words, *or elsewhere*.

Hawk. P. C. c. 19, § 18, and the authorities there cited.

And it hath been formerly holden, that even suits in a court of equity, to relieve against a judgment at law, are within the danger of these statutes, especially if they tend to controvert the very point determined at law, or to relieve in a matter relievable at law.

But for this vide tit. *Court of Chancery*.

Thirdly, Appeals to Rome are made *præmunires* by 24 H. 8, c. 12, and 25 H. 8, c. 19, by which it is enacted, "that such appeals as formerly were made to Rome, shall be made from henceforth to Chancery."

Fourthly, The exercising the jurisdiction of a suffragan without the appointment of the bishop of the diocese, is made a *præmunire* by 26 H. 8, c. 14, which sets forth at large how suffragans are to be nominated, &c.

Fifthly, By 25 H. 8, c. 20, "If a dean and chapter refuse to elect one named in the king's letter for a bishopric, and to certify such election to the king within twenty days after the license shall come to his hands, or if any archbishop or bishop after such election (or nomination by the king in default thereof, &c.) refuse to confirm and consecrate within twenty days the person signified to them by the king's letters patent, they incur a *præmunire*."

Sixthly, Maintaining the pope's power is made a *præmunire* by 5 Eliz. c. 1.

A. What Offences come under the Notion of a *Premunire*.

*Seventhly.* By 13 Eliz. c. 7. — If any one shall bring into the realm, &c., any silver *Tex.* monies, pictures, beads, or such like superstitious things pretended to be hallowed by the Bishop of Rome, &c., and shall deliver or offer the same to any subject to be used in anywise: or if any one shall receive the same to such intent, and not discover the offender, &c., or if a justice of peace, having any offence in that act declared to him, do not within sixteen days declare it to a petty commission, he incurs a *premunire*.<sup>7</sup>

*Eighthly.* By the 27 Eliz. c. 2. — Sending relief to any Jesuit, missionary priest, or college of priests or Jesuits beyond the seas, or to one not returning out of such college into England, shall incur a *premunire*.<sup>7</sup>

*Ninthly.* Persons refusing to take the oaths incur a *premunire* by several statutes, as 1 Eliz. c. 1. and 5 Eliz. c. 1, and 3 Ja. 1. c. 4, and 7 Ja. 1, c. 6, and 1 W. & M. &c., c. 1.

*Tenthly.* By 1771: *Byrn* 313. 374: 2 Feb. 1755. [But see s. 31 G. 3. c. 31.]

*Tenthly.* By the 6 Ann. c. 7, it is enacted. — "That if any person shall maliciously and directly, by preaching, teaching, or advised speaking, declare, maintain, and affirm, that the pretended Prince of Wales hath any right or title to the crown of these realms; or that any other person or persons hath or have any right or title to the same, otherwise than according to 1 W. & M. c. 2, and 2 W. 3, c. 2, and the acts then lately made in England and Scotland mutually for the union of the two kingdoms: or that the kings or queens of this realm with the authority of parliament are not able to make laws to limit the crown and the descent, &c., thereof, shall incur a *premunire*.<sup>7</sup>

By the statute 1 & 2 Ph. & M. c. 8, to molest the professors of abbey lands granted by parliament to Henry and Edward the Sixth is a *premunire*.

So likewise is the offence of acting as a broker or agent in any usurious contract, where above ten per cent. interest is taken, by stat. 13 Eliz. c. 10.

To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *premunire* by stat. 21 Ja. c. 3.

To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *premunire* by two statutes: the one 16 Car. 1, c. 21, the other 1 Ja. 2, c. 8.

On the abolition, by stat. 12 Car. 2, c. 24, of purveyance, and the prerogative of pre-emption, or taking any victual, beast, or goods, for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *premunire*.

To assert, maliciously or unadvisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *premunire* by stat. 13 Car. 2, c. 1; by the *habeas corpus* act, 31 Car. 2, c. 2, it is a *premunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas.

By 6 Ann. c. 23, if the assembly of the peers in Scotland, assembled to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *premunire*.

The statute 6 G. 1, c. 18, (enacted the year after the South-sea project,) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject to the penalties of a *premunire*.

## (B) Of the Punishment therein.

The stat. 12 G. 3, c. 11, subjects to the penalties of the statute of *præmunire*, all such as knowingly and wilfully solemnize, assist, or are at present at any forbidden marriage of such of the descendants of the body of King George the Second as are by that act prohibited to contract matrimony without the consent of the crown.

It is said, that if the bishop take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a *præmunire*. And in such case was Barlow, Bishop of Bath and Wells, in the reign of Edward the Sixth, who was forced to obtain a pardon for having deprived the dean of Wells, the deanery being a donative by letters patent from the king.

Degge, p. 1, c. 13; 3 Inst. 122; Bro. *Præmunire*, pl. 21.]

## (B) Of the Punishment therein.

MOST of the statutes of *præmunire* refer the punishment to 16 Ric. 2, c. 5, which enacts, "That those who offend against the purport thereof shall be put out of the king's protection, and their lands and tenements, goods, and chattels, forfeited to our lord the king; and that they be attached by their bodies if they may be found, and brought before the king and his council, there to answer to the cases aforesaid; or that process be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors."

The judgment in *præmunire* at the suit of the king, against the defendant, being in prison, is, that he shall be out of the king's protection; and that his lands and tenements, goods and chattels, shall be forfeited to the king; and that his body shall remain in prison at the king's pleasure: but, if the defendant be condemned upon his default of not appearing, whether at the suit of the king or party, the same judgment shall be given as to the being out of the king's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be an award of a *capiatur*.

Co. Lit. 129 b; 3 Inst. 125, 218; 2 Hawk. P. C. c. 48, § 9.

As the above-mentioned statute, 16 Ric. 2, c. 5, expressly saith, that such offenders shall be put out of the king's protection; and also the statute of 25 E. 3, stat. 5, c. 22, had farther added, that any one might do with a purchaser of the provisions therein prohibited, as with the king's enemy; and that he who should offend against such an one in body, lands, or goods, should be excused; it was formerly holden, that a person attainted in a *præmunire* might lawfully be slain by any one, as being the king's enemy and out of the protection of the laws; but the later opinions seem to have disapproved of this severity; and it is now expressly enacted by 5 Eliz. c. 1, § 21, 22, "That it shall not be lawful to kill any person attainted in a *præmunire*, saving such pains of death or other hurt or punishment, as heretofore might without danger of law be done upon any person that shall send or bring into the realm, or within the same shall execute any process, &c., from the see of Rome."

Co. Lit. 130; 12 Co. 68; 3 Inst. 128; Bro. *Cor.* 197; Jenk. 199.

It is clearly agreed, that a person attainted in a *præmunire* can bring no (a) action whatsoever; neither is it safe for any one, knowing him to be guilty, to (b) give him any aid, comfort, or relief.

Co. Lit. 130. (a) Whether he is entitled to surety of the peace. Hawk. P. C. c. 19, § 47. (b) That it seems doubtful whether there can be any accessories in *præmunire*, vide Stamf. P. C. 44; Plow. 97.

## (B) Of the Punishment therein.

It hath been resolved, that a statute, by appointing that an offender shall incur the penalty and danger mentioned in the 16 Ric. 2, c. 5, does not confine the prosecution for the offence to the particular process thereby given.

Vent. 173.

It is holden, that the statutes of *præmunire* which give a general forfeiture 'a' of all the lands and tenements of the offender, extend not to lands in tail.

Co. Lit. 130. (a) Whether the forfeiture of any lands, &c., shall relate to the time of the offence, or only to that of the judgment, Qu.; and vide Cra. Car. 173; Jen. 317.

It hath been adjudged, that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a *præmunire*.

Cra. Ja. 336; 2 Balst. 299.

The defendant in a *præmunire* must regularly appear in person, whether he be a peer or commoner, unless he is dispensed with by some writ or grant for that purpose; though in the case of Sir Anthony Mildmay,<sup>(b)</sup> he was allowed to plead a pardon to a *præmunire* by attorney: but (c) it has been thought that there was some clause to this effect in the pardon.

3 Inst. 125. (b) 1 Roll. R. 190; 2 Balst. 290. (c) 2 Hawk. P. C. 373.

Upon an indictment of a *præmunire*, a peer of the realm shall not be tried by his peers.

12 Co. 92, Ld. Vaux's case.

Upon an information on the statute 6 G. 1, c. 18, for setting up a bubble called the *North Sea*, it was determined, that the court was not obliged by that act to give the whole judgment, as in case of a *præmunire*, against the defendant, but only such parts of it as in their discretions they should think fit; and accordingly a fine of 5*l.* was set on the party convicted, and judgment that he should remain in prison during the king's pleasure.

3 Ld. Raym. 1361; The King v. Cawood, Stra. 473.

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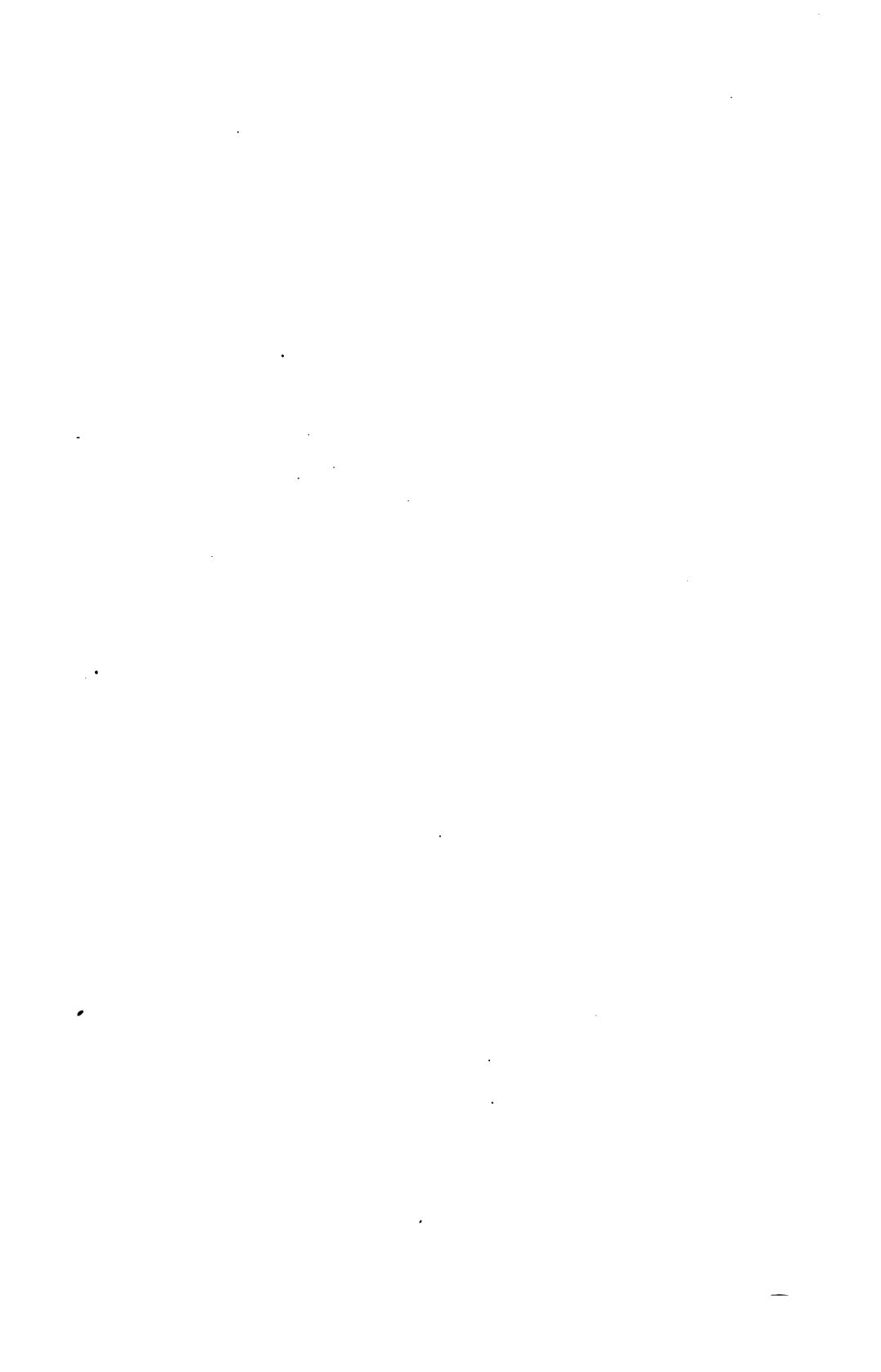
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